

ON THE SPECIFICITY OF MIDDLE EASTERN CONSTITUTIONALISM *

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I. INTRODUCTION

René Maunier, a prolific French ethnologist and jurist (1887-1951), summed up in 1935 the radical transformation of Middle Eastern law since the nineteenth century. In a brief report entitled *Outline of the Progress of Law in Muslim Land*, he noted the centrality of law in the immense change affecting the societies of North Africa that he knew: “Amongst the *social* changes which can take place, one should put first *legal changes*. In Islamic countries, there have been sometimes, over more than one hundred and fifty years already, a transformation of *legislation*, and a transformation of *jurisdiction*: new laws, new judges. This transformation (which was at times evolution, at times revolution) is an important occurrence, which can busy an investigator who is at once a jurist and a sociologist. *Rara avis!*”¹

The sociologist, of course, is not the only social researcher concerned with the irruption of new laws and new judges in “the age of codification”,² replete as it is with statutes and codes. Political scientists and students of “government” have been naturally concerned with the emergence

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¹ Jean-Robert Henry, *Approches ethnologiques du droit musulman: l'apport de René Maunier*, in L'ENSEIGNEMENT DU DROIT MUSULMAN 168 (M. Flory & Jean-Robert Henry eds., 1989) (“Parmi les changements *sociaux* qui peuvent avoir lieu, il faut placer, au premier rang, les *changements légaux*. Dans les pays d'Islam, il y a eu parfois, depuis déjà cent cinquante ans, transformation de la *législation*, transformation de la *juridiction*: des statuts nouveaux, des juges nouveaux. Cette transformation (qui fut tantôt évolution, tantôt révolution) est un grand fait, qui pourrait occuper un enquêteur qui fût juriste et sociologue en même temps. *Rara avis!*”).

² Chibli Mallat, *From Islamic to Middle Eastern Law: A Restatement of the Field*, 52 AM. J. COMP. L. 209, 285-86 (2004) (arguing that Islamic law went through three phases historically, the age of *shari'a* in the first two centuries of the Revelation (622 C.E.), the age of *fiqh* (the classical age of the comprehensive treatises, from the ninth-tenth century to the sixteenth century), and the age of *qanun*, which is the age of codification. *Shari'a*, *fiqh*, *qanun*, are all terms translatable as law).

of founding charters and constitutions in the new nation-states in the region. If taught in the Middle East, an introductory course on constitutional law would generally take the shape of a discussion of current constitutions and constitutional models in the world, with an emphasis on the local or regional constitutions, much in the way “droit constitutionnel” would have, until recently, been taught in France. This will be our approach in the present chapter. In an American setting, such a presentation would qualify under the rubric of “government” or “political science”. A course on constitutional law taught in an American law school entails a very different type of discussion, which is centered on case law as developed over two centuries of constitutional review by the U.S. Supreme Court. The discrepancy between the two modes of constitutional law study is qualitative. It also underlines the passage to an American-style of constitutional review in the Middle East in a slow but perceptible move away from the European tradition, at a time when many European countries have themselves been affected by the “Americanization of the law.”³

The ignorance of constitutional review by Middle Eastern countries is rooted in the process of colonization. Neither Britain, nor France until the emergence of the Fifth Republic in 1958, was ready to accept judicial fetters on Parliament’s sovereignty. The Middle Eastern colonies did not know any better. In a region where French legal education had prevailed in universities, and continues to dominate as far as the teaching method is concerned, the model of the U.S. Supreme Court was a remote and alien phenomenon. Curricula and courts followed suit.⁴

The absence until recently of constitutional councils and courts means that there has been scant judicial review in the U.S. mode in any Middle Eastern jurisdiction. Even in a common law country like Israel, where the English legal model was influential and remains central to date,⁵

³ See, e.g., CENTRE NATIONAL DE LA RECHERCHE SCIENTIFIQUE, L’AMERICANISATION DU DROIT (François Terré ed., 2001); Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997).

⁴ A cursive reading of the curricula of law schools in the Middle East shows the domination of western-style courses, with a few exceptions in countries such as Saudi Arabia. Even in Saudi Arabia, the teaching of law with an insistence on *fiqh* does not really count as *droit positif*. There are few monographs and articles on the subject of law schools. See generally, Enid Hill, *Al-Sanhuri and Islamic Law*, in 10 CAIRO PAPERS IN SOCIAL SCIENCE 18-20 (1987) (early law schools in modern Egypt); J. DUCRUET, LIVRE D’OR (1913-1993) DE LA FACULTÉ DE DROIT, DE SCIENCES POLITIQUES ET ÉCONOMIQUES 7-64 (1995) (law schools in the modern Lebanese state); DONALD MALCOLM REID, CAIRO UNIVERSITY AND THE MAKING OF MODERN EGYPT (1990); BERNARD BOTIVEAU, LOI ISLAMIQUE ET DROIT DANS LES SOCIÉTÉS ARABES 167-89 (1993).

⁵ English decisions are quoted extensively by Israeli courts, and the Israeli bar continues to recognize United Kingdom law degrees. See SHIMON SHETREET, JUSTICE IN ISRAEL: A STUDY OF THE ISRAELI JUDICIARY (1994).

judicial review always fell short of the judges' constitutional review of parliamentary statutes. In the absence of a constitution, there is in Israel no "superior" text which can serve as a yardstick for ordinary laws, although piecemeal "Basic Laws" with so-called "entrenched rights" have been introduced since the foundation of the state in 1948 to enlarge that writ. Still, the legacy of the British concept of absolute Parliamentary sovereignty remains a marked feature of the Israeli system. This applied, *mutatis mutandis* until the 1980s, across the region. Only in Pakistan is it different, following the example of the neighboring Indian constitutional court, but the turmoil of the Pakistani political system since independence in August 1947 has rendered that experiment relative and inconsistent.⁶

Against this weak tradition, the trend towards judicial review of constitutions is strong across the Middle East, with the introduction of various models of constitutional review in the last decades in Egypt, Iran, and the United Arab Emirates, and more recently in Yemen, Lebanon, Jordan, Algeria, and Morocco.⁷

An analysis of Middle Eastern constitutional law is therefore possible on two levels. Following the French model, the analysis would examine the political institutions of various states, the way elections are carried out, the separation of powers if any, and the division of responsibilities between executive and legislative powers in constitutional texts and in practice. The system can therefore be studied from a top-bottom perspective, the way constitutional law is usually taught in France ("*gouvernants* and *gouvernés*"). This is the analytical course pursued here.

The other type of analysis follows a U.S. mode of exposition. There, decisions of the courts are the focus of the analysis, in so far as they shed cumulative light on the rule of law getting fleshed out in the practice of judicial review understood largely, and in constitutional adjudication for more recent experiments. Judicial review is the focus of a different study.⁸

The same subject matter, constitutions and constitutional law, can be appreciated therefore under these two different lights, which also correspond to a top-down as opposed to a bottom-up process. In addition to the distinction between classical French constitutional law in its descriptive exposition on the one hand, and, on the other hand, the U.S. discussion of the Supreme Court's constitutional decisions (the U.S. law schools' Socratic Method), a further distinction, this time between English law and U.S. law,

⁶ Martin Lau, *Introduction to the Pakistani Legal System, with Special Reference to the Law of Contract*, in 1 YEARBOOK OF ISLAMIC AND MIDDLE EASTERN LAW 3-28 (E. Cotran & C. Mallat eds., 1994). For further discussion, see Martin Lau's subsequent annual entries in later volumes of the YEARBOOK OF ISLAMIC AND MIDDLE EASTERN LAW.

⁷ CHIBLI MALLAT, AN INTRODUCTION TO MIDDLE EASTERN LAW (forthcoming 2006) [hereinafter MALLAT, INTRODUCTION].

⁸ *Id.*

helps appreciate the two different ways in which judicial review itself may get carried out. When, as in the UK, a constitution does not nominally exist—for instance in Israel and Saudi Arabia, Middle Eastern judges must resort to “ordinary” laws or to general principles of the law of the land. More often a constitution does exist, but the courts have no constitutional jurisdiction. This is the most common situation, which prevails in the Maghreb, in the Levant, in Iraq, and in the Gulf. When they examine a case which involves a “human right,” judges cannot turn to the constitution which usually enunciates it. In effect, the situation becomes similar to that of countries without a constitution. Courts are limited to applying ordinary law, generally administrative law as known in France or in the United Kingdom.

Overall, Middle Eastern constitutional law has predominantly followed the French “political science/government” model, and ignored constitutional scrutiny in its American—and since 1949, German—form. However, recent years have witnessed the timid but increasing allure of constitutional review. This rise deserves a full, separate study,⁹ together with the shape of “constitutional law” in Middle Eastern countries under the English model of “judicial review” in their sub- or pre-constitutional nature.

One can then follow constitutional law in the Middle East in a traditional French-style manner, examining executive, legislative, and judicial powers, their respective powers and interaction, and the way rulers get chosen (or not) to govern a country. While some of this traditional description is inevitable, it may be more useful to underlie arguably specific Middle Eastern themes. The present article examines accordingly contemporary constitutional law under three headings, which determine a wide concept of constitutional law from the point of view of *gouvernants*: (1) the shadow of transjurisdictional unity and its failure; (2) the dominant ideological and legal debate on the key concepts of constitutionalism, democracy, and Islam, often presented under the wide rubric “democracy and Islam (or sometimes other local religions and sects)”; and (3) the suggested *summa divisio* between personal and territorial law. This is law—or political, institutional power—as exercised from the top.

II. THE FAILURE OF TRANSNATIONAL INSTITUTIONS

However hazy, a Middle Eastern pattern exists, which, for particular historical reasons connected with colonialism and the fragmentation of the area, needs some attention: the craving of people for a unity built on a real or imagined Arab or Islamic commonwealth.

⁹ *Id.*

Article 52 of the Charter of the United Nations favors the emergence of sub-regional groupings as a matter of principle.¹⁰ Such regional grouping is hardly a yearning exclusive to the Middle East. Many countries which appear less prone to integration have managed to create working regional subsystems the world over. In the one area which prides itself for a centuries-old legacy of Arab-Muslim empires and offers in its rhetoric a deep obsession with ‘unity’ against the fragmentation forced upon the region by modern colonialism, it is ironic that nearly all transnational endeavors have ended in failure. Still, the ebb and flow between nation-states’ exclusive sovereignty and transnational models have considerably affected the structure of the rule of law in the Middle East.

Through the historical domestic formation of each state, as well as with regard to regional processes, constitutions in the 20th century Middle East offer the figure of a tug-of-war between transnational integration and the independent development of national institutions. Constitutional development of the region’s legal systems can be followed along these two lines: the separate growth of the twenty-five or so present independent countries in the Middle East, and the complex and uncertain process of their integration or dismemberment or both.

While the political disenfranchisement of nation-states in the region has generally unfolded in a similar process of colonization followed by independence, the legal constitutional development of Middle East systems lay primarily in the specific and discrete legal and institutional construction within each state. Owing to individual countries’ separate national development, the region is more accurately approached jurisdiction by jurisdiction. This is also consistent with history: Algeria’s colonization by France for a hundred and thirty years means that the constitutional setting of independent Algeria was profoundly different from the process which took place in neighboring Morocco, where the French protectorate (1906-1956) did not seek to uproot the local ruler altogether. *Mutatis mutandis*, the mode of colonization is different for every single jurisdiction. This is easily illustrated in the case of Algeria and Morocco when compared with the Gulf States, especially Saudi Arabia and Iran, the only two countries that were never formal colonies.

¹⁰ U.N. Charter, art. 52, paras. 1, 3 (“Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations. . . . The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.”).

In parallel with developments prevalent in each individual jurisdiction, supra-state unity was pursued at various moments on the basis of geographic or national-religious commonality. This effort was pervasive in the twentieth century Middle East, where the search for transnational unification operates on linguistic-ethnic (Arabic, Kurdish, Turkish-Turanian, etc.) and religious (Muslim, Shi'i, Sunni...) factors, together with, on the opposite side, the rejection of the nation-state boundaries in favour of sometimes smaller and allegedly more homogenous entities (Christian Maronites in Lebanon; Berbers and Amazighs in Algeria; Kurds in Iraq, Syria, and Turkey; Kurds and Azeris in Iran, etc.).

In most instances, the institutional development within unchallenged boundaries has carried the day. Such is the situation of Morocco, Algeria, Libya, Tunisia, Egypt, Mauritania, Syria, Jordan, Saudi Arabia, and so far also Turkey and Iran. In some cases in contrast, the nation-state is problematic, and the regional overtone dominant. This is evident in Lebanon and Palestine-Israel, where fragmentation did (or does) threaten the unity of a given territory. Protracted civil strife tends to lead to *de facto*, if not *de jure*, distinct entities. For instance, this is seen in the endemic civil wars in Afghanistan and Sudan, in the Kurdish 'safe haven' established in June 1991, which lasted until the reunification of Iraq in April 2003 when Baghdad fell to American power, or in Somaliland as a break-away state from war-ridden Somalia: all are cases in point of failed states resulting in self-ruling, unstable sub-national entities. But regional considerations and transnational yearnings also regularly push Middle Eastern governments to attempt mergers on the basis of larger entities—with various degrees of failure or success.

The interconnection between state development and regional integration is most clear in the case of the Arab-Israeli conflict. In September 1993, when the Israeli Prime Minister and the leader of the Palestine Liberation Organization (PLO)—as the umbrella organization of Palestinian nationalism—initialed a first agreement in Washington, there already existed in theory a Palestinian state, which had been proclaimed in November 1988 and officially recognised by over one hundred governments in the world. However, the State of Palestine did not receive a strong enough recognition to allow it to figure as such in the United Nations, nor did it have any territorial control over the part of Palestine which it purported to be located in, and to which, in any case, the founders of the new state had not ascribed any defined boundaries.

The Palestinian "entity" lacked the formal attributes of a normal state until it came into some "territorial" being. As a consequence, even though the Chairman of the PLO had put himself forward as the President of the State of Palestine, there was no Palestinian government, and the rest of the PLO institutions had retained a non-state character, with only shades of diplomatic "embassy-status" in some friendly countries. This meant in

terms of constitutional law a complex picture of a state-in-formation with the hallmarks of a transitory and frail authority where institutions cannot be recognised as similar to those of any other normal state. The Oslo Accords altered the picture, transforming the 1988 Palestine state into a more real hope, but its reality, a decade later, was still elusive.¹¹

This is not to say that there was no “constitutional” law for Palestine, or for Palestinians, before the Oslo Agreement and subsequent texts came into being. One could distinguish a clear institutional Palestinian format under the umbrella of the Palestine Liberation Organisation, a “Basic Law” of sorts under the name of the National Charter,¹² and a “legislative” body constituted by the Palestinian National Council (PNC). The PNC regrouped, from both the Palestinian diaspora and the Territories occupied by Israel in 1967, the Palestinian notables who met and debated regularly. The PNC also elected an Executive Committee, headed by a Chairman.¹³

Despite the formal recurrent Palestinian get-together, the split representation between Palestinians in the interior and Palestinians in exile expressed the limited legislative role of the PNC. For the PNC, there was never a question of issuing statutes for a homeland over which Palestinians have no legal control. Yet, because of the in-built consensual process and a relatively meaningful representation among the Palestinian constituencies that the PLO had forged, the decisions of the Executive Committee of the PLO were not tantamount to dead letter. There was a significant financial power—although not strictly a budget—tightly held by the Executive Committee’s Chairman. There also was an important social and military infrastructure, which was regulated by the semi-institutionalised consultations of the PLO organs, including “revolutionary courts” with a dubious track record at various stages of military autonomy in and around the Palestinian camps of the diaspora.

This is the “domestic” side of the Palestinian state. But the internal structure pales constitutionally into insignificance when compared with the dominant regional process. The regional process, in turn, is only legal to a limited extent. It has been determined, in the twentieth century, by a violent struggle involving communities and armies whose technological and disciplinary cohesion allowed the Jewish colonies and, after 1948, the Israeli

¹¹ See *infra* Part III. See generally THE ARAB-ISRAELI ACCORDS: LEGAL PERSPECTIVES (Eugene Cotran & Chibli Mallat eds., 1996).

¹² See CHIBLI MALLAT, THE MIDDLE EAST INTO THE 21ST CENTURY: THE JAPAN LECTURES AND OTHER STUDIES ON THE ARAB-ISRAELI CONFLICT, THE GULF CRISIS AND POLITICAL ISLAM 61-66 (1996) [hereinafter MALLAT, 21ST CENTURY] (discussing the Palestinian National Charter(s)).

¹³ See HELENA COBBAN, THE PALESTINIAN LIBERATION ORGANIZATION 13 fig.1 (1984). See generally YEZID SAYIGH, ARMED STRUGGLE AND THE SEARCH FOR STATE: THE PALESTINIAN NATIONAL MOVEMENT 1949-1993 (1997).

state, to have the upper hand. On the legal level, the agreements and treaties in the area, mainly the Camp David Accords of 1978 and the Oslo Accords of 1993 and 1995,¹⁴ offer an inroad into the influence of the law over the states and peoples involved. It is in this context that the role of the Arab League, as well as the various state coalitions in the area, also yields some significance. The implications are evident for any Palestinian state, entity, homeland, or regional formation which may emerge from the peace process, with its roller-coaster hopes and failures. Meanwhile, the law for the majority of Palestinians in exile has been refugee law as administered by the United Nations through a special agency called the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), but it is also a complex motley of laws in areas like the West Bank, where Israeli military decrees were superimposed on Jordanian and Ottoman law. West Bank residues of Jordanian law are themselves composed of articles of the Ottoman nineteenth century Majalla, classical Islamic law regulations¹⁵ and state-of-emergency decrees dating from English domination, adapted and renovated by Israeli military decrees. Hence the importance of the regional framework for a definition of Palestinian 'constitutional' law.¹⁶

The supra-state dimension may be glaring in the case of Palestine, but it is also significant in almost all the Arab countries after independence. Examples can be listed in the regional conflicts which have plagued the area since the Second World War, the last and most spectacular occurring upon the invasion of Kuwait and its annexation for seven months by Iraq between August 1990 and March 1991.

The vanishing and re-emergence of the state in the case of Palestine and Kuwait show the prevalence of regional considerations over internal state formation. Another instance of the problem of the nation-state in the Middle East, in contrast, suggests that the regional factor may act in a con-

¹⁴ S.C. Res. 1397, U.N. Doc. S/RES/1397 (Mar. 12, 2002). S.C. Res. 1515, U.N. Doc. S/RES/1515 (Nov. 19, 2003). *See generally* GEOFFREY R. WATSON, *THE OSLO ACCORDS* 37 (2000). The official title of the agreement between Egypt and Israel is the Egyptian-Israeli Treaty. It was signed at Camp David in 1978. The so-called Oslo Accords stand for The Declaration of Principles on Interim Self-Government Arrangements, signed in Washington on September 13, 1993, known as Oslo 1, and the Israeli-Palestinian Agreement on the West Bank and the Gaza Strip, signed in Washington on September 28, 1995, known as Oslo 2. There were no further formal agreements as of 2005, despite various tentative accords, including two 'Taba agreements' soon after the so-called Second Intifada broke out on September 28, 2000. Security Council Resolutions 1397 and 1515 and international plans, especially by 'the Quartet,' established, or promised to establish, a Palestinian state.

¹⁵ *See generally* MICHAEL DUMPER, *ISLAM AND ISRAEL: MUSLIM RELIGIOUS ENDOWMENTS AND THE JEWISH STATE* (1994) (providing an overview of *waqf* systems).

¹⁶ *See generally* AL-SHAYBANI SOC'Y OF INT'L LAW LTD., *THE PALESTINE YEARBOOK OF INTERNATIONAL LAW*. *The Palestinian Yearbook of International Law* is a major source of scholarship and reference on Palestinian constitutional law. It has been edited since 1984 by Anis F. Kassim, and subsequently by Camille Mansour.

structive way. In 1990, for the first time since early colonisation two centuries ago, the two parts of Southwest Arabia known as the Yemen were united. With the foundation of the Yemen Arab Republic in 1962 and the independence of South Yemen in 1967, two different legal systems had ruled the southern Popular Democratic Republic of Yemen and the northern Arab Republic of Yemen. Their union in 1990 triggered a number of transitional steps, starting with the formation of a unified government under a new constitution. From the inception of the politically united Yemen, the difficulty in streamlining legal institutions was apparent, not only in commercial, civil, land, and criminal matters, with South Yemen coming out of a socialist and collectivist system of laws, but also in other sensitive matters such as family law and the structure of the judiciary. As the populations merged, the family law of South Yemen, which was one of the more egalitarian Arab statutes in terms of women's rights, and the more traditional family law of North Yemen, passed in 1984, needed to be unified both procedurally and in terms of substance.¹⁷ Unification of the judiciary into a single court system also meant that the looser, more informal and more Zaidi-oriented Northern system had to accommodate a British-inspired hierarchical structure which prevailed, until the Union, in the Southern courts. While operational for three years, unified Yemen fell prey to what proved to be a trying merger of institutions. With the country in the throes of civil war from April 27, 1994 to the fall of Aden in the hands of the Northern-based army in June of that year, the collapse and refection of the Yemen illustrated, once again, the hazards of unity dreams.¹⁸ The initially voluntary merger was done by sheer force, and the question remains open on the long-term stability of the merged Yemen, but unity survived into the new century.

On the western side of the Arab world, the Grand Maghreb was declared in 1989, at the meeting in Marrakesh on February 17 of five heads of state—Mauritania's, Morocco's, Algeria's, Libya's, and Tunisia's. Unlike several previous attempts between various countries to move towards integration, the Treaty on the Arab Maghreb Union (AMU) created formal institutions, including a Presidential Council with a six-month rotating head of state, a Council of Foreign Affairs Ministers, a Consultative Council formed

¹⁷ Chibli Mallat, *The Search for Equality in Middle Eastern Family Law*, in AL-ABHATH 48-49, 7-63 (2000) [hereinafter Mallat, *Family Law*].

¹⁸ See generally BRINKLEY MESSICK, *THE CALLIGRAPHIC STATE: TEXTUAL DOMINATION AND HISTORY IN A MUSLIM SOCIETY* (1993) (an elaborate work on law in the Yemen). On Yemeni law generally, and other Middle Eastern and Arab jurisdictions, the annual entries in *THE YEARBOOK OF ISLAMIC AND MIDDLE EASTERN LAW* (Eugene Cotran & Chibli Mallat eds., pre-1998 & Eugene Cotran & Martin Lau eds., 1998-2005) [hereinafter *YEARBOOK*] (offering helpful points of legal entry in jurisdictions, some of which have little or no legal scholarship available for study. Since its establishment in 1994, nine volumes have appeared.).

by members of the respective Parliaments, as well as a committee of judges drawn from each country to adjudicate potential litigation. This institutional shell remains today, but the internal uncertainties plaguing the government of each country, and the tendency for the leaderships to act outside the frame of the AMU have not made the prospects of integration any closer two decades into the AMU Treaty. With less than a fraction of the overall economic exchange taking place in the Grand Maghreb despite the geographic contiguity of the five states, and the autocratic traditions prevailing at the helm, the grand design and ideals of the heads of government could hardly stand the test of time.¹⁹

A similar attempt can be found in the Gulf Cooperation Council (GCC), and in the Arab Cooperation Council. The first of these two regional formations, constituted in 1981 between Saudi Arabia, Kuwait, the United Arab Emirates, Bahrain, Oman, and Qatar, was a response to the Iran-Iraq war which had disrupted the stability of the Gulf region starting in September 1980. Despite the common institutions—a Supreme Council, a Ministerial Council, and a Secretariat, the fragility of the group was patent in the inability of the GCC to defend Kuwait effectively, one of its member states, against its legal obliteration by Iraq in August 1990. The second regional group, created on January 16, 1989, between Iraq, Egypt, Jordan and North Yemen, also fell victim to the quick pace of regional changes in the form of the unity between North and South Yemen and the hiatus between Egypt and Iraq after the invasion of Kuwait.

This striving for unity on a regional basis persists as a lasting magnet in the Middle East. Although this drive was more often than not defeated before the ink had dried on “the acts of unity,” there are some significant instances where unity developed into real constitutional integration. The first case occurred when Syria and Egypt merged in 1958 into the United Arab Republic. The experience lasted two years and ended in total disarray, but the two years saw significant, if not lasting, changes in the constitutional set-up of the two countries, including the merger of Parliaments and the entrusting of executive leadership to one president.²⁰

¹⁹ For annual entries on each country, see *YEARBOOK*, *supra* note 18, and *ANNUAIRE DE L'AFRIQUE DU NORD* (Eberhart Kienle ed., 2003) (published since 1962, this collection includes surveys with a strong public law content. A plethora of semi-official publications in French and Arabic accompanied the declaration of the Grand Maghreb).

²⁰ Comprehensive collection of constitutions in Arabic in *AL-DASATIR FIL-'ALAM AL-'ARABI 1839-1987* 567-570 (Constitutions in the Arab world, Yusif Quzma Khuri ed., 1988) [hereinafter *AL-DASATIR*], in French in *CONSTITUTIONS DES PAYS ARABES* (Eric Canal-Forgues ed., 2000) (providing useful introductions to each constitution); in English in *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* (Albert P. Blaustein & Gisbert H. Flanz eds., 1982). Unless otherwise specified, references hereinafter to articles in Arab constitutions can be found in these collections.

A more enduring enterprise of unity is that of the former Trucial States of the Eastern Arab Peninsula. The United Arab Emirates ("UAE") is a federation of the Emirates of Dubai, Sharjah, 'Ajman, Umm al-Quwayna, Fujaira, Ras al-Khaima, and Abu Dhabi.²¹ It was formed in 1971 and operates under a constitution (UAE Constitution) which was designed originally for a period of five years, and which has since been extended periodically. The greatest difficulty in the federal experience of the UAE consists in finding the right balance between the federal powers and the power of individual Emirates; it was agreed that even though the major issues were to be decided by the Federation, each Emirate could legislate until the matter would be covered by UAE federal law. The Emirates retained in this way the significant residual legislative role not specifically granted to the Federation by the constitution.

The deciding body of last resort in the UAE is the Supreme Council, which is formed by the Rulers of each Emirate and their deputies. It establishes UAE policy, decrees laws, and is entrusted with ultimate decision-making for the Federation on the basis of majority vote, but Abu Dhabi and Dubai retain a veto power because of their greater importance as the richest and most populated Emirates in the Federation. The Supreme Council appoints, from amongst its own members, the President and the Vice-President of the UAE, who are in charge of issuing union laws after the consultation of the Council of Ministers, in turn appointed by the President. The President is also the Chairman of the Supreme Council.

Alongside the President, the Supreme Council, and the Council of Ministers, a National Federal Council is in theory responsible for passing laws. In fact, the forty members of the Council are not elected, and their role as appointees of the Rulers is predominantly consultative. The legislative process is therefore in the hands of the Rulers and, by delegation, the Council of Ministers. Article 110 of the UAE Constitution stipulates that a bill becomes law after 'preparation' by the Council of Ministers, which submits it to the approval of the Supreme Council and the President.²² In theory the bill should also receive the agreement of the National Federal Council

²¹ See generally ROSEMARIE SAID ZAHLAN, *THE MAKING OF THE MODERN GULF STATES* (1998). See generally UNITED ARAB EMIRATES COURT OF CASSATION JUDGMENTS 1998 - 2003 (Richard Price & Essam Al Tamimi eds., 2005) and UNITED ARAB EMIRATES COURT OF CASSATION JUDGMENTS, 1989-1997 (Richard Price & Essam Al Tamimi eds., 1998) for a rare publication of collective decisions of the United Arab Emirates appellate courts.

²² See AL-DASATIR, *supra* note 20. Article 110 of the Provisional Constitution of the United Arab Emirates, "*Al-dustur al-mu'qqat li-dawlat al-imarāt al-'arabiyya al-muttahida*." THE PROVISIONAL CONSTITUTION OF THE UNITED ARAB EMIRATES art. 110.

which can be dispensed with if the bill is ratified by the President after approval by the Supreme Council.²³

The Federation allows for a distinctive limitation of powers by the individual Emirates, including control over their natural resources, taxation, and police. In 1981, Article 142 of the UAE Constitution was amended by the Supreme Council in order to strengthen federal power by restricting the right to levy the army to federal authorities. The leeway left to the local rulers for the regulation of their own affairs tends to slowly give way to federal power, with part of the oil revenues going into the federal budget which is drafted by the Council of Ministers and approved by the Supreme Council.

Although it is clear from the constitutional set-up of the state that the main separation of powers derives from the traditional autonomy of the local rulers, the UAE represents the only working federation in the Middle East. It depends in practice on a mode of consensus amongst the individual rulers, rather than on the democratic interplay between institutions, and renders the federal arrangements fragile. The experiment is nonetheless exceptional, since other regional integration attempts have all ended in failure.

The most telling example of the failed attempts at Arab integration is the Arab League,²⁴ founded in Cairo in the wake of the Second World War. The Arab League is neither a unitary nor a federal system. As a loose confederation, it lacks central political authority, and the decisions it takes are reached on the basis of unanimity. The treaty establishing the Arab League was signed by Egypt, Iraq, Lebanon, Syria, Saudi Arabia, and Jordan on March 22, 1945. The Arab League defined its objectives generally as better cooperation among the Arab countries and the defence of their common interests. With more Arab countries acquiring independence, the League grew in size and importance, and has often acted as a mediating body in the conflicts between Member States. It occasionally plays a role in the relations between Member States and the outside world—such as the European Union, but it has tended to be mostly active in the confrontation between the Arab world and Israel. Badly bruised after the expulsion of Egypt from its midst in the wake of the Camp David Accords in 1979, it took the Arab League ten years to create a new façade of Arab unity, only for the 1990 invasion of Kuwait by Iraq to signal the swan song of its efficiency.

Yet the Arab League did play the role of a cultural and social focus enhancing regional exchange, including in the field of law. This was done through two means: in the first place, the Arab League's Secretary-General

²³ THE PROVISIONAL CONSTITUTION OF THE UNITED ARAB EMIRATES, arts. 110, cls.3 & 4.

²⁴ See AL-DASATIR, *supra* note 20, at 125-127 (Founding Charter (*mithaq*) of 1945: "Jami'at al-duwal al-'arabiyya").

retains a role not dissimilar to the United Nations Secretary-General in the world system. He is chosen for a renewable period of five years by two-thirds of the Member States' representatives. Although his functions are not specified with any precision, he has acted as the Arab League spokesman in time of consensus, as well as a mediator between states in conflict. The decisions of the Arab League's Council are implemented through him and the Arab League offices; the Council itself is formed by representatives of the Member States, who meet irregularly, sometimes at summit level. The second regional focus of the Arab League lies in the various treaties and sub-organisations that it has spawned since its establishment. In 1950, a "common defence and economic cooperation" treaty was entered into as a way to institutionalise military and economic councils. It has remained a blank letter. Many other Arab organisations saw the light, such as the Arab Postal Union (1954), the Arab Bank for Development (1959), the Arab Financial Institute (1961), the Arab Common Market (1964), the Arab Federation for Tourism (1965), though all are equally ineffective. There are specialized offices which tend to be more useful than the "organisations," like the Institute of Arab Manuscripts, which has managed to coordinate efforts in a marginal area, and the Anti-Israel Boycott Office which issues guidelines for legislation that bear some of the hallmarks of a "federal" legislation. For example, standard international business contracts in Arab countries have included, until the peace treaties with Israel, a clause which renders the contract void if the non-Arab party has a manufacturing branch in Israel. However, in the absence of a controlling body, which never materialised despite the repeated talk about an Arab Court of Justice, it was left for each State to issue the regulations and to implement commonly agreed boycott policies. In practice, legal integration at the level of such Arab institutions has been haphazard, poor, and inefficient.

Less official but practically more significant inter-Arab organisations were professionally based. To date, such bodies as the Union of Arab Writers and the Union of Arab Lawyers can be viewed as lasting, if not particularly successful region-wide professional organizations. Although the world of politics has dominated their irregular meetings, joint work was possible on a professional basis, occasionally resulting in comparative legislative drafts. A case in point is the Draft Personal Status Law issued in 1986 by the common endeavour of the Arab Ministers of Justice.²⁵ While it is not

²⁵ The Project for a Unified Arab Code of Personal Status, *Mashru' qanun 'arabi muwahhad lil-ahwal al-shakhsiyya*, 'agreed' in final form in 1986, was some ten years in the making. It appears, together with a detailed commentary in the form of preparatory works, in 2 AL-MAJALLA AL-'ARABIYYA LIL-FIQH WAL-WADA' 11-43, 43-265 (1985) (providing the text and the preparatory works respectively). The Code is presented and discussed in the article on family law, see Mallat, *Family Law*, *supra* note 17.

likely to be implemented in the near future, it offers a meaningful example of the persistent search for regional legislative convergence.

On the whole, the Arab League was unable to transcend its image of an inefficient parleying forum to become a real federative unit. On the economic level in particular, where some progress was expected pace the European model, the Arab Common Market has proved a failure. Although there is significant labour and business traffic between Arab states due to deep family and cultural ties, the bulk of the exchange has taken place between each Arab country and the industrialised world, and it is notable that a visa for many Arabs to visit, or work in, other Arab countries, is much harder to obtain than a similar permission for European or Asian citizens. On the wider level, after the Camp David accords and the isolation of Egypt, the headquarters of the Arab League were transferred from Cairo to Tunis. Only after Egypt went back to the Arab fold in the late 1980s was pressure re-initiated to bring the headquarters back to Cairo. The move was completed in late 1990. But the occupation of Kuwait in the summer of 1990 showed in dramatic fashion the limitations of the Arab League's powers, with the Secretary-General tendering his resignation before the incapacity of the organisation to solve the problems it was set up to face. Despite talk about amending Article 7 of the Charter of 1945 to change decision-taking from consensus to qualified majority as in recent treaty developments in Europe, the mere opposition of a single state remains sufficient to cripple the Arab League institutions.

What about federation efforts through Islamic, in contrast to Arab, common values? Inefficient as the Arab League may have been in terms of rendering the legal systems of the Middle East more cohesive, the parallel efforts introduced on the level of Islamic integration have faltered even more patently. In the first place, integration through Islam is a much wider enterprise, and is more difficult to fathom in a practical manner than under the label of Arabism. Arab countries tend to be more cohesive and better defined than "Muslim" or "Islamic" countries, and offer a geographical and linguistic continuum: the Arab world spans, in the formula of the advocates of Arab unity, the region stretching "from the Ocean Atlantic to the Gulf". In contrast, Muslim countries are more numerous—the Muslim population in the world is approximately 1 to 1.2 billion, compared to some 280 million Arabs, and Muslim countries are geographically far apart. Unity of the Muslim world would have to include Indonesia, Nigeria, Iran, and Albania, since all these countries count more than eighty percent Muslim citizens, but Islam has not yet proved able to offer sufficient economic and legal common ground for a privileged cooperation between them. Furthermore, there are sizeable Muslim minorities in Europe, Africa, Asia, including the former states of the Soviet Union, China, and South Africa, and increasingly

articulate Muslim communities in Europe demanding that aspects of Islamic law be taken more seriously into account by the national legislatures.²⁶ The unity of the Muslim world seems even harder to achieve than the elusive search for Arab integration.

Notwithstanding these disparities between Muslim countries, the rise of Islam as a political phenomenon in the 1980s has been matched by an increase in the demand for the application of the *shari'a* world-wide. Yet the aspiration towards greater Islamic unity has been organisationally poor. The Islamic Conference, which included fifty-two states at the Casablanca Summit in December 1994, fifty-five states at the Tehran Summit of December 1997, and fifty-six states in the first decade of the 21st century,²⁷ meets irregularly, and its decisions are taken even less seriously than the Arab League's.

This does not mean that the Islamic legacy is an insignificant feature in the legal process of Middle East countries. But its international dimension has been mooted on the legal level since the heyday of the Islamic Revolution in Iran, in contrast with its political prominence. True, the Constitution of Iran itself stipulates in its Preamble that Islamic solidarity would be pursued world-wide, and one can find in the operation of the Saudi State the desire to organise Islamically on the world level—e.g. in the works of the Islamic World League, based in Jeddah,²⁸ not to mention long-standing pan-Islamic claims of leaders such as Egypt's Naser or Libya's Qadhdhafi. Still, the impact of Islam has been restricted to the domestic level in *legal* practice.

Since September 11, 2001, the nature of the confrontation has taken a global course, but this operates mostly on a political rather than legal level. I have argued elsewhere that there are forms of legal internationalism in Islam based on the classical Shi'i system of the *marja'iyya*, whereby a lay Shi'i is bound to follow his or her leader (the *marja'*) irrespective of nationality or boundaries. Chosen freely amongst a number of prominent legal authorities by every Shi'i individual, the *marja'* becomes in effect a binding legal reference for Shi'is across the world, if his followers are sig-

²⁶ See, e.g. LE STATUT PERSONNEL DES MUSULMANS: DROIT COMPARÉ ET DROIT INTERNATIONAL PRIVÉ (Jean-Yves Carlier & Michel Verwilgen eds., 1992); See also *Europe, in ISLAMIC FAMILY LAW* 119 (C. Mallat & J. Connors eds., 1990) (including chapters by Bernard Berkovits, Sebastian Poulter, Riva Kastoryano, and Dima Abdulrahim).

²⁷ The Organization of the Islamic Conference (*Munazzamat al-mu'tamar al-islami*), <http://www.oic-oci.org> (last visited Feb. 2, 2005) (indicating establishment in Morocco, 1969 and Charter adopted, 1972). See also SAAD S. KHAN, REASSERTING INTERNATIONAL ISLAM: A FOCUS ON THE ORGANIZATION OF THE ISLAMIC CONFERENCE AND OTHER ISLAMIC INSTITUTIONS (2001).

²⁸ REINHARD SCHULZE, ISLAMISCHER INTERNATIONALISMUS IM 20. JAHRHUNDERT: UNTERSUCHUNGEN ZUR GESCHICHTE DER ISLAMISCHEN WELTLIGA (1990)

nificant enough for him to become the dominant “supreme” leader.²⁹ On the Sunni side of the divide, there is little doubt that an “international Sunni” has developed around al-Qa‘eda, but the organisation is secretive and lacks state support since the rapid collapse of Taliban rule in Afghanistan in October 2001. Unlike the structured institutions of the Shi‘i *marja‘iyya*, there is little “law” in the international Sunni, but the planetary scope of Qa‘eda-related violence raises pressing questions about the international dimension of Islamic law also in its Sunni dimension. Here, explicit references in modern constitutions discussed next may be less telling than the deeper constitutional structure which we examine in a final section. But explicit references are also important, which operate in an uneasy matrix composed of the *shari‘a*, constitutionalism and democracy.

III. ISLAMIC LAW, CONSTITUTIONALISM, DEMOCRACY

Muslim advocates of democracy often quote those verses in the Qur‘an in which God demands from the believers to decide their affairs by a process of consultation—*shura*.³⁰ Supportive examples are adduced from the first Caliphs’ process of selection—the *bay‘a*³¹—and various aphorisms on the intrinsic freedoms of the individual, notably Caliph ‘Umar admonishing “the unacceptability of putting fetters on people whose mothers created free.”³² Handy as the aphorisms may be, they can be countered by other sayings and realities of “Oriental despotism,”³³ as in the image of the sword-wielder standing behind *The Thousand and One Nights* sultan to execute his master’s “off-with-their-head” commands.³⁴ On balance, the textual tradition is probably more supportive of the values of justice and freedom—as would be expected in any world religion. A lawyer can and will make the point, however, on whatever evidence he or she can find, blowing an aphorism out of its original proportion and away from context to fit the case at

²⁹ See CHIBLI MALLAT, *THE RENEWAL OF ISLAMIC LAW: MUHAMMAD BAQER AS-SADR, NAJAF AND THE SHI‘I INTERNATIONAL* 27-107 (1993) [hereinafter MALLAT, *RENEWAL*]. See also MALLAT, 21ST CENTURY, *supra* note 12, at 127-172.

³⁰ QUR‘AN 42: 36, 3: 53 enjoining ‘politics by consultation’ (*al-amr shura baynakum*). See Roy Mottahedeh, *Consultation and the Political Process in the Islamic Middle East of the 9th, 10th, and in 11th Centuries*, in *ISLAM AND PUBLIC LAW: CLASSICAL AND CONTEMPORARY STUDIES* 19 (Chibli Mallat ed., 1993) for an early historical context of *shura*.

³¹ See Chibli Mallat, *Introduction: On Islam and Democracy*, in *ISLAM AND PUBLIC LAW: CLASSICAL AND CONTEMPORARY STUDIES* (Chibli Mallat ed., 1993) (discussing the early historical concept of *bay‘a*).

³² See WAJDI MALLAT, *MAWAQEF – POSITIONS* 23-25 (2005) for other similar references.

³³ See KARL A. WITTFOGEL, *ORIENTAL DESPOTISM: A COMPARATIVE STUDY OF TOTAL POWER* (1957).

³⁴ Despite the received notion, the image of the *sayyaf* (the ‘sword-wielder’ standing behind the ruler to execute his orders on the unfortunate soul who might have antagonised him) in *The Thousand and One Nights* is not dominant. He appears only in a few stories.

hand. In a less cynical rendering of lawyerly opportunism, it is a healthy and normal feature for societies to keep rediscovering their past traditions, in order to adapt them to their preferred vision of immediate reality. The process of discovery is never neutral. As value-bound by the present, the modern interpreter will consciously or unconsciously undertake surgical interventions in the past to feed on immediate and pressing demands.

From the professional historian's more detached perspective, anachronisms for or against "the compatibility between Islam and democracy" or "between constitutionalism and Islam" cannot be too useful. The original *shura* and *bay'a* are only vague cousins of the corresponding consultation and election processes of the modern age. Slavery is a universal medieval feature, which in some Middle Eastern countries continued well into the twentieth century, and talk of freedom in such context is per force faulty. Yet freedom is a strongly rooted concept,³⁵ and there is a palpable civil society at work in classical Islam, if by civil society one understands organisations and people whose activity is not directed by the state.³⁶ In classical Islam, professions, a merchant bourgeoisie, and an active judiciary in various forms—judges, *muftis*, and law scholars—offer a reality which is clearly autonomous from the state, and qualifies naturally as civil society. Equal justice before the law and the presence of individual rights suffuse the Islamic legal tradition. To that extent, the modern Middle East may have ignored precious forms of proto-democratic balancing in favor of raw and arbitrary state power.

As for the problem of Islamic law being prevented from change because it is God's law—as the political expression of the "closing the gate of *ijtihad*", the issue has been for all societies, including those professing allegiance to Islam, a matter of "the ultimate interpreter." In this context present crises surrounding democracy tend to get befuddled. The problem is not so much the issue of whether man or God makes the law, but which of the many competing men, and more rarely women, are empowered to interpret it.

³⁵ See FRANZ ROSENTHAL, *THE MUSLIM CONCEPT OF FREEDOM: PRIOR TO THE NINETEENTH CENTURY* (1960) (providing a critical treatment of this idea).

³⁶ See John Donohue, *Individualisme, corporatisme et Etat: où se trouve la civilité dans la société civile au Moyen Orient?*, in 65 TRAVAUX ET JOURS 161 (2000) (discussing civil society in the Arab world, and referencing cites for classic and modern times). See also Chibli Mallat, *Madkhal ilal-adab al-saghir: al-mujtama' al-madani, Huquq al-aqalliyyat wath-thaqafa fil-mashreq* [Introduction to littérature mineure: Civil Society, Minority Rights and Culture in the Mashreq], in AL-AB'AD ATH-THAQAFIYYA LI-HUQUQ AL-INSAN FIL-WATAN AL-'ARABI [CULTURAL PERSPECTIVES ON HUMAN RIGHTS IN THE ARAB WORLD] 453 (A. al-Na'im ed., 1993); and Chibli Mallat, *Renforcer la Société Civile contre l'Etat: Horizons du travail international au Proche et Moyen Orient, commentaire sur le Rapport de la Banque Mondiale sur la Gouvernance au Proche et Moyen Orient* (Nov. 21, 2003), available at <http://www.worldbank.org>.

On a modern historical timeline, developments towards a democratic polity did not come much later to the core of the Islamic world—the Middle East—than to most European countries. The three major blocs which had some room for manoeuvre, the Ottoman Empire, Iran, and Egypt, featured prominent reformist ideas throughout the nineteenth century. The movement known as constitutionalism had so matured by the beginning of the twentieth century that radical changes were attempted in each of these three blocs to bring about a founding charter resembling a social contract. Room for maneuver is critical here, and it is no surprise that the process did not develop in that direction in North Africa, where colonisation was keen to prevent any form of indigenous political representation threatening the Frenchness of Algeria and neighbouring countries, and that it was scuttled in Lord Cromer's Egypt. Where some democratization went ahead in practice, in 1908 in the Ottoman Empire, from 1905 to 1909 in Iran, Islam was used by the reformists to great effect. Na'ini, an Iraqi *faqih* of Iranian descent who died in 1936, wrote a treatise on the virtues of constitutionalism as the 1905-1909 constitutional revolution was unfolding,³⁷ and the Constantinople Majlis-e Mab'uthan (Parliament of the Emissaries) featured between 1908 and the First World War the first elected proto-federal parliament in the Middle East, which included Ottoman subjects from present-day Turkey, Syria, Iraq, Israel-Palestine, and Saudi Arabia.³⁸ On a comparative timeline, federal and democratic developments came only a few years after the establishment of the Third Republic in France and are contemporaneous of brief interwar parliamentary experiments in Germany and Italy. They precede similar constitutional developments in Spain.

Then came all-out war in Palestine. War is a great distorter. Democracy and human rights in times of war tend to remain frozen, as in the case of the U.S. citizens of Japanese descent who were interned during the Second World War, with the blessing of the U.S. Supreme Court, or more recently, as in internments with little due legal process of "Arab suspects" in the UK in the early run-up to the Gulf War, anticipating in turn the "black legal hole" of Guantanamo Bay prison.³⁹ Much more than for Europe and

³⁷ See ABDUL-HADI HAIRI, *SHI'ISM AND CONSTITUTIONALISM IN IRAN* (1977) (providing information on MUHAMMAD HUSAIN NA'INI, *TANBIH AL-UMMAH WA TANZIH AL-MILLAH* (1906), which was published in Najaf circa 1906 and reprinted in the 1960s through the care of Ayat Allah Mahmud Taleqani, one of the leaders of the Islamic Revolution of 1979).

³⁸ The minutes of that Parliament are available, and the present debate on federalism in the Middle East will gain much from their serious study by scholars. See pioneering work by KHALED BARAZI, *THE MAJLIS MEBUSAN (MECLIS-I MEBUSAN): THE OTTOMAN PARLIAMENT* (2002) (Ph.D Thesis, London University).

³⁹ See Colonel Gordon Risius, *Prisoners of War in the United Kingdom*, in *THE GULF WAR 1990-91 IN INTERNATIONAL AND ENGLISH LAW* 289 (Peter Rowe ed., 1993); Bernadette Walsh, *Detention and Deportation of Foreign Nationals in the United Kingdom During the Gulf Conflict*, in *THE GULF WAR 1990-91 IN INTERNATIONAL AND ENGLISH LAW* 289 (Peter

the United States, the problem of interfering wars has been endemic in the twentieth century Muslim world. First came colonialism, which will remain a troubling episode of raw domination in humanity's modern course, dovetailing with a First World War which was itself very colonial. When the killing frenzy stopped, the call for parliaments and freedom was loud and clear, without an exception, across the region.⁴⁰ Again, such calls for independent representation did not curry much favour with Britain and France, the main winners of the spoils, for whom the rule of law was only worth pursuing if defined within the scope of their own unchallenged dominance; and in the case of Britain, one should always remember that a whole people was uprooted from their land in Palestine under British control.

For indigenous liberal movements, of which the Egyptian party al-Wafd offered in between the two world wars the paragon of an outspoken and well-structured liberal-democratic party for the whole Middle East, as well as the most attentive one to the necessity of fair and free representation, distaste for violence meant a long and drawn out conflict. British stonewalling prevented it from yielding decisive fruit in time before the onset of the Second World War and the subsequent emergence of the Palestine conflicts. The self-determination transition to democracy, unlike India, was scuttled, and the Palestinian-Israeli wars acted, in turn, to radicalise extremism heralded in authoritarian regimes, many of which were still in place several decades after the coups that brought them to power.

Within these historical constraints, a synchronic perspective of the sundry forms of the "constitutional law" in the Middle East can be presented in a brief typology of the constitutional-political systems as they function at the turn of the 21st century in the area, with a focus on the role of Islamic law, or democracy, or both, as the background to an increasingly central debate. This is typically an exercise in constitutional law in its French traditional form.

Rowe ed., 1993); *See also* A v. Sec'y of State for the Home Dep't, [2004] UKHL 56 (lowering the standard of proof for the accused in "terrorism" acts but rejecting any "legal black hole" that the terrorism phenomenon may create, where no proper judicial review is possible); Rehman v. Sec'y of State for the Home Dep't, [2001] UKHL 47; Rasul v. Bush, 542 U.S. 446 (2004). *See also* Johan Steyn, Lord, House of Lords, Guantanamo Bay: The Legal Black Hole, Remarks at Twenty-Seventh F.A. Mann Lecture (Nov. 25, 2003) (transcript on file with author); Owen Fiss, Sterling Professor of Law, Yale Univ., The War Against Terrorism and the Rule of Law, Remarks at Oxford University: H.L.A. Hart Memorial Lecture in Jurisprudence and Moral Philosophy (May 10, 2005) (transcript on file with author); Some of the most proficient material was put together in, Global constitutionalism: Nationhood, Same-sex marriage, at Yale Law School Global Constitutionalism Seminar, Part iii (Sept. 21-24, 2005); *See also* Chibli Mallat, *The Original Sin: "Terrorism" or "Crime against humanity"?*, 34 CASE W. RES. J. INT'L L. 245 (2002).

⁴⁰ *See* ALBERT HOURANI, ARABIC THOUGHT IN THE LIBERAL AGE 1798-1939 (1983). *See also* HAMID ENAYAT, MODERN ISLAMIC POLITICAL THOUGHT (1982).

Several studies have appeared in recent years, offering an overview of the political-constitutional systems of Arab and Middle Eastern countries.⁴¹ Whilst political studies inevitably devote some attention to historical processes at large, historians have also developed syntheses on political and constitutional developments, and the two approaches converge significantly.⁴²

Rather than repeat or summarise this French-style constitutional exercise with the description of the various institutions in each state and their respective operations and competence, we propose to look more closely at the incorporation of Islam as a differentiating factor in the constitutional framework of the Middle East.

Islam figures in the majority of the constitutions and founding texts of Middle Eastern States, and most Arab countries have a reference to Islam in their constitutions. The Islamic Republic of Mauritania and the Islamic Republic of Iran carry the reference in their official appellation as states. In other countries, Islam is consecrated as the official religion. In others yet, the Muslim affiliation of the Head of State is required.⁴³

Although cosmetic in some cases, the Islamic reference is patent overall. Its reassertion in constitutional law was comforted by the rise of revolutionary Islam in Iran and elsewhere. A famous amendment to Article 2 of Egypt's constitution in 1980 stipulated, for example, that the "*shari'a*" would be "the"—as opposed to the previous "a"—sole source of legislation in the country.⁴⁴ This opened up the debate over the exclusive or pervasive role of the *shari'a* in the system. The controversy over Article 2 remains, especially over such significant issues as *riba* and interest in the financial and civil system. In countries like Egypt or Pakistan, executive and judicial

⁴¹ See MICHAEL C. HUDSON, *ARAB POLITICS: THE SEARCH FOR LEGITIMACY* (1979) and LES RÉGIMES POLITIQUES DES PAYS ARABES (Maurice Flory & Robert Mantran eds., 1968) (providing classic compendia in English and French respectively).

⁴² See, e.g., MALCOLM YAPP, *THE NEAR EAST SINCE THE FIRST WORLD WAR: A HISTORY TO 1995* (1996); ALBERT HOURANI, *A HISTORY OF THE ARAB PEOPLES* (1991); IRA M. LAPIDUS, *A HISTORY OF ISLAMIC SOCIETIES* (2d ed. 2002) (discussing the deeper historical period covering the whole world of Islam); BERNARD LEWIS, *THE MIDDLE EAST: A BRIEF HISTORY OF THE LAST 2,000 YEARS* (1995). See also NATHAN J. BROWN, *THE RULE OF LAW IN THE ARAB WORLD: COURTS IN EGYPT AND THE GULF* (1997) and NATHAN J. BROWN, *CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD: ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT* (2002) (discussing political science and law in the contemporary Middle East).

⁴³ TAD STAHNKE & ROBERT C. BLITT, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, *THE RELIGION-STATE RELATIONSHIP AND THE RIGHT TO FREEDOM OF RELIGION OR BELIEF: A COMPARATIVE TEXTUAL ANALYSIS OF THE CONSTITUTIONS OF PREDOMINANTLY MUSLIM COUNTRIES* (Mar. 8, 2005), available at http://www.uscirf.gov/countries/global/comparative_constitutions/03082005/Study0305.pdf.

⁴⁴ THE CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT art 2 (amended 1980). Original text of 1971 Constitution is available in AL-DASATIR, *supra* note 20, at 591-600.

efforts of the Courts to prevent the supremacy of Islamic law from overflowing the totality of the financial system have not been decisive, despite a 1992 decision of the Federal Shariat Court of Pakistan that deemed the whole banking system to stand in contradiction with the requirement, under Article 227 of the Pakistani Constitution, to conform with the *shari'a*. The issue has been pending since then before the Pakistani Supreme Court.⁴⁵

In the Sudan, the *shari'a* is the single most divisive constitutional issue in a country where the Southern population is in its majority not Muslim. The introduction and implementation of strict *shari'a* criminal legislation in 1983, with the cutting of the thief's hand and executions for "apostasy,"⁴⁶ led to the deposition of the country's autocratic leader, but subsequent governments continue to face a deadlock which has persisted for decades.

It is perhaps in Iran that the greatest juristic effort was exerted towards introducing Islamic law in its allegedly pristine form at all levels of the State. The constitutional experience of post-revolutionary Iran is mitigated, and the system was not running so smoothly as to avoid the numerous Amendments introduced to the text only ten years after its adoption in 1979. Still, partly because of the relative openness of the domestic debate in contrast to Arab countries, the constitutional experiment of Iran remains one of the most alluring in the region.

The Iranian constitution was elaborated under the concept of *wilayat al-faqih* (*velayat-e faqih* in Persian), or the governance of the jurist(s). This theory was adumbrated by Ruhullah al-Khumaini back in 1970 and developed in the 1979 writings of the Iraqi scholar Muhammad Baqer al-Sadr, who was executed by the Ba'th regime a year later. It was introduced in the Iranian constitution that year by an adaptation of the deep-rooted Shi'i institution of the *marja' iyya*: we have seen that the *marja' iyya* vests the elaboration of the law in the most knowledgeable jurists in the Shi'i world, who in the tradition are known as *marja'* (plural *maraje'*, reference) and act as source of emulation.⁴⁷ As the best experts in the law, the

⁴⁵ Chibli Mallat, *Commercial Law in the Middle East: Between Classical Transactions and Modern Business*, 48 AM. J. COMP. L. 81, 124-29 (2000) (discussing the decision on *riba* in Pakistan and the debate over it).

⁴⁶ See ABDULLAHI AHMED AN-NA'IM, *TOWARD AN ISLAMIC REFORMATION* (1990) (discussing the 1985 execution of opponent Mahmud Taha by Nimeiry). See also CAROLYN FLUEHR-LOBBAN, *ISLAMIC LAW AND SOCIETY IN THE SUDAN* (1987) (discussing the early forced introduction of Islam to the Sudan).

⁴⁷ Emulation, *taqlid*. The *maraje'* are known today in Iran as Ayatollahs (in Arabic and Persian, *Ayat Allah*, literally "sign" or "verse of God"). See generally ROY MOTTAHEDEH, *THE MANTLE OF THE PROPHET: RELIGION AND POLITICS IN IRAN* (1985) (discussing and offering conclusions on the Iranian revolution which are still valid today); see also SHAUL BAKHASH, *THE REIGN OF THE AYATOLLAHS: IRAN AND THE ISLAMIC REVOLUTION* (1984).

jurists are, in the system, entrusted with protecting the Islamic nature of the state. This is reflected in Article 5 and Article 107 of the Iranian Constitution, which vest the ultimate constitutional decision with the “supreme” jurist in the country, the leader or guide,⁴⁸ a position held by Khomeini until his death in 1989, and taken on after him by a man he effectively appointed to the job after dismissing another “leader” who turned out to be averse to his version of what the Islamic revolution should be.⁴⁹

In another form, the dominance of the jurist is manifest in the Council of Guardians, which examines the conformity of each law passed by Parliament with the *shari'a* and with the Constitution. In effect, the Council of Guardians has turned to be such a powerful organ in the first decade of the Constitution that its role was curtailed in the 1989 Amendments by the creation of a political body overarching the Council—the Majma'-e Tashkhis-e Maslahat-e Nezam, the Council for the determination of the nation's interest, whose role is to solve the recurrent conflicts between the Council of Guardians and Parliament.⁵⁰

But the dominance of the jurist as expert in Islamic law is not total in the system, for there are a number of other institutions which are similar to Western constitutional models. Mention was made of the Iranian Parliament, but there is also a President who is voted in by universal direct suffrage. Against direct representation, the screening role of the supreme jurist—the “leader”, as well as that of the jurists of the Council of Guardians, is typical of a country in search of safeguards and self-perpetuation for its ruling group of clerics. The problem with the Council vetting candidates to both Parliament and presidency is fundamental, leading in a succession of elections to a generally meaningless contest between “conservative” and “progressive” supporters of the *mullahs'* leadership.

The Iranian set-up, whose toned-down parallels can be found in Pakistan and Egypt, offers the most concrete Islamic challenge to classical constitutionalism in the Middle East by allowing the judiciary — the Islamic jurists of the Shi'i tradition — a key role as ultimate interpreter of the constitution.

On the other side of the Islamic spectrum of explicit reference to Islam in a country's constitutional system stands the Kingdom of Saudi Arabia. A monarchy that has systematically rejected the principle of

⁴⁸ In Persian, *rahbar*.

⁴⁹ See MALLAT, RENEWAL, *supra* note 29, at 89-91, 104-107; MALLAT, 21ST CENTURY, *supra* note 12, at 129-32 (discussing the leadership between Khomeini, Muntaziri, and Khamene'i).

⁵⁰ See MALLAT, RENEWAL, *supra* note 29, at 89-107, 146-57; see also MALLAT, 21ST CENTURY, *supra* note 12, at 143-47 (discussing the constitutional crisis leading to the emergence of the Majma').

representative elections,⁵¹ Saudi Arabia offers a marked contrast to its Persian neighbour across the Gulf. The antagonism between the two countries shows the wide variety allowed under the concept of an Islamic state. Saudi Arabia prides itself so much on being an unadulterated Islamic system in its following of the theses of Wahhabi Hanbalism that it refuses to adopt a Constitution. For Saudi rulers, “the Qur’an is the constitution,” and the whole institutional set-up is but a derivative of the Qur’an. This is confirmed in the first article of the Basic Law of 1992: “The state’s constitution is the Book of God and the *sunna* of the Prophet.”⁵²

Beyond the overall reference to the Qur’an, how is Islamic Saudi Arabia governed, and how is Islamic law featured in it? There is little doubt that the persona of the King and of the immediate Sa‘ud family concentrate the most significant legislative and executive powers in the Kingdom. Such control was not always that tight, Article 5 of the 1926 Fundamental Law of the Hijaz, the Western part of Saudi Arabia, which was joined by conquest to the Najd central area in the 1920s, states that “His Majesty is bound by the rules of the *shari‘a*.”⁵³ No separation of powers was recognised in government until the basic laws introduced in March 1992. An explicit recognition was then acknowledged for the first time, resulting first in the establishment of a “consultative assembly, the Majlis al-Shura.”⁵⁴ The Majlis was originally composed of a president and 60 members whom the King chooses among persons of knowledge and experience.⁵⁵ Article 44 offers potentially the most significant change in the system with a limited set of reforms: it acknowledges the principle of the separation of powers: “the powers in the state are composed of judicial power, executive power, and legislative power.”⁵⁶

⁵¹ Abdulaziz H. Al-Fahad, *Ornamental Constitutionalism: The Saudi Basic Law of Governance*, 30 YALE J. INT’L L. 375, 375 (2005) (quoting King Fahd, “The system of free elections is not suitable to our country, the Kingdom of Saudi Arabia”). Limited elections were conducted in 2005 on the municipal level. No democratic breakthrough resulted. There are also recurring elections to the Jeddah chamber of commerce; in 2005, for the first time, women could be elected to these positions.

⁵² The Basic Law of Governance (*Nazam al-hukm*), Royal Order A/90 (Mar. 1, 1992) [hereinafter Basic Law of Governance] was decreed by King Fahd on March 28, 1992, together with two other laws, the Law on the Consultative Assembly (*Nazam majlis al-shura*) [hereinafter Consultative Assembly], Royal Order A/91 (Mar. 1, 1992), and the Law of Provinces (*Nazam al-manatiq*), Royal Order A/92 (Mar. 1, 1992) [hereinafter Law of Provinces]; The texts of each are available as separate booklets on file with the author. They are also available at <http://www.saudiembassy.net> (follow “About Saudi Arabia” hyperlink; then follow “Laws” hyperlink) (last visited Feb. 2, 2005).

⁵³ See AL-DASATIR, *supra* note 20, at 148-50.

⁵⁴ For the remainder of this piece the Majlis al-Shura will be referred to as “Majlis”.

⁵⁵ Consultative Assembly, *supra* note 52, art. 3.

⁵⁶ Basic Law of Governance, *supra* note 52, art. 44. The Arabic term for “legislative” used here is *tanzimi*, which is unusual. In other Arab countries, the word used is *tashri‘i*.

However, even this “revolutionary” recognition is undermined by a qualification introduced, in the same article, to the effect that “the King is the *marja*’ of these powers.”⁵⁷ The word *marja*’ (literally reference) used in Arabic is unexpected for Hanbalis, as it is steeped in the Shi’i tradition of the *marja*’iyya, but the neologism carries enough respectability across the modern Arab world to make its use alluring to the Saudi rulers. Notwithstanding the haziness of the concept in a Saudi context and the ambiguity in the relationship of the King to these three powers because of the difficulty to define what a *marja*’ is, any uncertainty is soon removed. The Majlis may, if requested by ten or more members, initiate bills or propose amendments to existing ones. This proposal is transmitted to the Chairman of the Majlis, who may pass it on to the King.⁵⁸ The King decides what to do with the proposal and there is no recourse against him. Legislation remains clearly the prerogative of the Council of Ministers under the presidency of the King. Should any doubt persist, the Majlis’s legislative competence is further defined as the voicing by the Majlis of its opinion in the general policies of the state which are passed onto him by the Prime Minister,⁵⁹ who stands for the King. According to the first President of the Majlis, Muhammad ibn Jubayr, these powers entail “the examination of the laws”⁶⁰ which the *wali al-amr*, literally the person in charge, that is the King, will issue, before these laws are promulgated.”⁶¹ In effect, the power of the Council of Ministers is discretionary. The government chooses the laws it may submit to the opinion of the Majlis al-shura, and all the necessary safety valves to avoid any significant power of the Majlis at the expense of the King can be found in the key areas of basic laws: discretionary appointment by the King of all the members of the Majlis, no financial power for the Majlis, no right for the deputies to deliberate in public, and a residual right to initiate legislation, but not to approve or vet it.

As a result, legislative and executive powers operate in terms of a division of labour that confers on the King and his family dominant legislative *fiat*, through decrees, and sole executive power. Forms of supervision and consultation are retained to accommodate a first tier of religious jurists, notably the descendants of the Wahhabis, and, increasingly, the prominent merchant and business families and the growing educated tier of technocrats. This larger process of consultation was formalized in 1992 in the es-

⁵⁷ *Id.*

⁵⁸ Consultative Assembly, *supra* note 52, art. 23.

⁵⁹ *Id.* art. 15.

⁶⁰ In Arabic *anzima*. This word is usually used in Saudi Arabia for decrees and laws alike, including codes.

⁶¹ Interview, AL-MAJALLA AL-‘ARABIYYA (Feb. 24, 1993).

tablishment of an Assembly which gives some public prominence and recognition to the larger Saudi public, but no executive power.

The 1992 Basic Law of Governance states that the system of governance in the Kingdom of Saudi Arabia is a monarchy.⁶² The veneer of “constitutional reform” notwithstanding, the King, who has now shed all other titles to don the more simple and evocative “Protector of the Two Holy Places (Mecca and Madina),”⁶³ rules much as absolute monarchs did in the medieval period. Insofar as there are no constraining constitutional texts outside his allegiance to the Qur’an, the monarch is absolute and the system is self-perpetuating. The King appoints during his life a successor “from amongst the sons of the founder King Abdulaziz”⁶⁴ (the appointee is not necessarily a descendant) who, in turn, is confirmed in power by the citizens⁶⁵ when the King dies, under the process of *bay’a*. Since there is no formal mechanism for the *bay’a*, any popular confirmation or rejection remains theoretical.

The King in effect embodies all executive, legislative, and judicial powers in Saudi Arabia. Any autonomous power operates on the basis of the monarch’s right to delegate. In 1953, a royal decree instituted for the first time a Council of Ministers directed by the Crown Prince. The Council of Ministers responds exclusively to the King, who remains its official head. Of note is the fact that the concentration of formal powers in the hands of the King has been reinforced under the 1992 “constitutional” arrangements. Delegation operates vertically, through the Council of Ministers, the various Ministries, and the bureaucracy. Delegation also operates horizontally, with the King appointing a number of representatives from amongst the ruling family to head the various administrative regions in the vast Kingdom.⁶⁶ Here again, the new law on the regions introduced in 1992 did not present any tangible break with the previous regime, and members of the Sa’ud family directly man the direction of regions as Emirs.

In this constellation of predominantly authoritarian texts, the riches of Islamic law as surveyed elsewhere do not appear as a source of inspiration for the system in any noticeable way.⁶⁷ But the *shari’a* resurfaces on a number of levels other than the personal devotion of the King and his ap-

⁶² Basic Law of Governance, *supra* note 52, art. 5.

⁶³ In Arabic, *hami al-haramayn*.

⁶⁴ *Id.* Note that this provision’s precedent appeared in the 1876 Ottoman Constitution. THE OTTOMAN CONSTITUTION.

⁶⁵ In Arabic, *muwatinun*; Consultative Assembly, *supra* note 52, art. 6.

⁶⁶ This arrangement is now provided for under the second “basic law” enacted in March 1992, the Law of Provinces, or *manatiq*. Law of Provinces, *supra* note 52.

⁶⁷ See Chibli Mallat, *From Islamic to Middle Eastern Law: A Restatement of the Field (Part I)*, 51 AM. J. COMP. L. 699 (2003); Chibli Mallat, *From Islamic to Middle Eastern Law: A Restatement of the Field (Part II)*, 52 AM. J. COMP. L. 209 (2004).

pointees. In part, conformity with the tradition derives from conservative Puritanism rooted in Wahhabism, both a legal and theological tradition. It is within the tribal system that the protection of the Islamic values *lato sensu* operates. Alongside the increasingly powerful bureaucracy, and sometimes despite it, the Saudi tribes follow their own traditions, which are arguably Islamic, with at the head of each tribe a shaykh, whose connection with, and influence on, the ruling family, depends on a number of factors including historical allegiance and the size and centrality of the tribe.⁶⁸ In criminal law for instance, the old system of blood money (*diyya*) which is typical of tribal justice, and whose roots go back in time at least until the Prophet, has remained a manifestation of the continuing blending of tribal customs and Islamic law, as well as a further example of the persistence of an ancient Middle Eastern legal pattern.

More formally, Islamic law is protected by the presence of the *'ulama*, the jurists, in sensitive ministries such as education and justice, as well as in the judiciary. Even where, as in commercial law, Western inroads have been made on a large scale, lip-service allegiance to the *shari'a* remains patent, and is encountered at all tiers of the system.

For Islamic law in Saudi Arabia, the problem, however, is that there may not be as much of it as would be desirable. The Islamic legal tradition offers a great wealth of layers which, together, constitute a deep and sophisticated system of the law in Islam. Because of a tradition of secrecy in public affairs, which has been reinforced for a long time by the financial compensations which the state uses to soothe its citizens and secure their silence, Saudi law is an elusive world: notwithstanding some recent efforts to regulate the profession, there is no acknowledgment by the government of lawyering as profession, and no bar association.⁶⁹ Saudi lawyers, who number no more than a few hundred in a population of 15 million, are mainly dedicated to disputes over wealthy state procurement contracts, generally with foreign companies which find it difficult to operate without a specific set of legal rules and enlist the support of legal counsel to navigate in the bureaucratic maze. Counsel is essentially restricted to matters of commercial law and foreign investment. In family law disputes, which are adjudi-

⁶⁸ See Alexander Bligh, *The Saudi Religious Elite (Ulama) as Participant in the Political System of the Kingdom*, in 17 INT'L J. MIDDLE E. STUD. 37 (1985) (discussing the understudied aspect of Saudi Arabia of tribes and "ulama"). See also Hermann Frederick Eilts, *Traditionalism Versus Modernism: A Royal Dilemma?*, in IDEOLOGY AND POWER IN THE MIDDLE EAST (Peter J. Chelkowski & Robert J. Pranger eds., 1988); NATANA J. DELONG-BAS, WAHHABI ISLAM: FROM REVIVAL AND REFORM TO GLOBAL JIHAD (2004); MAI YAMANI, CRADLE OF ISLAM: THE HIJAZ AND THE QUEST FOR AN ARABIAN IDENTITY (2004); MADAWI AL-RASHEED, A HISTORY OF SAUDI ARABIA (2002).

⁶⁹ See, e.g., Hussam Salah Hejailan, *Saudi Arabia*, in 7 YEARBOOK OF ISLAMIC AND MIDDLE EASTERN LAW 271, 275 (Eugene Cotran & Chibli Mallat eds., 2000) (explaining that efforts to bring order to the professions have had mixed outcomes).

cated by loosely regulated tribunals, and even in criminal law, where the writ of courts is limited as the prosecution has a wide and purposefully imprecise competence which includes sentencing, lawyers are not welcome.

The most important court in the Kingdom is Diwan al-Mazalim, which is also exceptional in so far as some of its decisions have been published.⁷⁰ Since 1989, the Diwan has also been competent to hear commercial cases, and there is a strange right of appeal to the Diwan al-Mazalim from within the Diwan al-Mazalim. In the absence of reports, little can be known about the work of other courts, and even the Diwan al-Mazalim has stopped publishing its decisions.

This problem of secrecy vis-à-vis the law can be seen in the poor quality of the official journal, *Umm al-Qura*, which brings together laws and statutes, news bulletins on the most trivial activities of the main dignitaries, as well as announcements of tenders and of religious conversions. Yet, together with those decisions of the Diwan al-Mazalim that have seen the light, *Umm al-Qura* offers to the lawyer and legal scholar a contemporary source material which sheds useful light on the operation of law in Saudi Arabia. A skeletal official journal, and a bar on a system of law reporting do not allow much leeway to justice seen to be done. A telling example on the constraints of law as can be fathomed in the secretive Kingdom appears in the constraints put on the deliberation of the 60-strong members of the new Majlis (enlarged—or watered down—since to 150). The members are “forbidden, under any condition whatsoever, from carrying with them outside the Majlis any papers or laws or documents which relate to their work.”⁷¹

⁷⁰ The collection on the decisions of Diwan al-Mazalem on file with the author consists of seven volumes, all published by the secretariat of the Diwan. It includes *Majmu'at al-mabade' al-shar'iyya wal-nizamiyya*, four volumes covering the period 1397-1399 (1977-79), 1400 (two volumes), and 1401. This series, which features full decision, includes miscellaneous administrative disputes. The second series includes criminal decisions and comprises three volumes. It is entitled *Majmu'at al-qararat al-jaza'iyya*, part one on *qadaya al-tazwir* in 1400, part two on *qadaya al-rashwa wa muqata'at isra'il*, also in 1400 (1980). A third volume also covers *qadaya al-rashwa wal-tazwir* for 1401. These hefty compendia yield much information on the rule of law in Saudi Arabia during the short period they cover. Their value is made all the more remarkable by the fact that the Diwan discontinued publication of its decisions after that period. No published decisions are available in typical criminal law cases or from family courts. Even death sentences are not published.

⁷¹ Article 14 of the *la'iha dakhiliyya* (internal organization) of the Majlis (on file with the author); the 1992 Basic Laws have generated much interest, but the studies, including ours here, tend to be more descriptive than analytical. This should not be surprising considering the secrecy of the Kingdom's politics. See generally A. M. Tarazi, *Saudi Arabia's New Basic Laws: The Struggle for Participatory Islamic Government*, 34 HARV. INT'L L. J. 258 (1993) and Al-Fahad, *supra* note 51 (arguing that although the limited changes may be empty, they are at least “frank”).

Across the Arabian Gulf, one therefore witnesses two conspicuously different Islamic constitutional traditions, both proud of their respect for Islamic law and its pervasive application. In Saudi Arabia, the dominance of a rigid monarchical system allows for various forms of informal consultation, but, unlike Republican Iran, a representational process in the shape of elections is all but absent. Despite this significant difference, the self-portrayal of government as Islamic is dominant in both countries.

On the other side of the Middle Eastern constitutional world, in countries like Turkey, Israel, and Lebanon, the main reference in the system is to democracy. This is also the case in the slow move away from absolutism in Jordan and in Morocco, operating in fits and starts under the pressure of society and the patronising whims of occasionally enlightened monarchs.

In Turkey, the democratic process has been haphazardly applied since the end of the Second World War, but the past two decades offer a consistent attempt at the protection of constitutional normalcy after a long spate of military coups, including a remarkable Muslim-Democratic experience since the access to power of the Islam-style Refah party in the early 21st century.⁷² In Israel, where freedom of expression generally goes unchallenged, the democratic process has been vitiated by the domination of large, unrepresented Arab populations in the 1967 Occupied Territories, coming on the heels of a pattern of ethnic cleansing now firmly documented by historical research. Within Israel proper, a two-tier structure of citizenship segregating Arab Israelis from their Jewish counterparts also undermines the democratic character of the system, both in terms of law—segregation against Arabs in naturalisation, land ownership, and military service—and in effective governmental participation.⁷³ All these negative

⁷² See, e.g., BERNARD LEWIS, *THE EMERGENCE OF MODERN TURKEY* (1961) for a discussion of political science and history on both Turkey and Israel that remains the classic work on the passage in a book from the Ottoman Empire to the modern Republic of Turkey. See also HALIL INALCIK, *THE OTTOMAN EMPIRE: THE CLASSICAL AGE 1300–1600* (Norman Itzkowitz & Colin Imber trans., 1973) and STANFORD J. SHAW & EZEL KURAL SHAW, *HISTORY OF THE OTTOMAN EMPIRE AND MODERN TURKEY: VOL. II: REFORM, REVOLUTION, AND REPUBLIC* (1977) for comprehensive introductions to the Ottoman period; ANDREW MANGO, *THE TURKS TODAY* (2004) for overviews of recent Turkish history; Soli Özel, *Turkey at the Polls: After the Tsunami*, 14 J. DEMOCRACY 80 (2003) for a discussion of Turkey's strenuous efforts towards electoral stability; WILLIAM HALE, *TURKISH POLITICS AND THE MILITARY* (1994) for an analysis of the military's role in modern Turkey; YORAM PERI, *BETWEEN BATTLES AND BALLOTS: ISRAELI MILITARY IN POLITICS* (1983) for a study of the role of the Israeli military; BARUCH KIMMERLING, *THE INVENTION AND DECLINE OF ISRAELINESS: STATE, SOCIETY, AND THE MILITARY* (2001) for a sociological study on modern Israel; BARUCH KIMMERLING, *ZIONISM AND TERRITORY: THE SOCIO-TERRITORIAL DIMENSIONS OF ZIONIST POLITICS* (1983).

⁷³ See DAVID KRETZMER, *THE LEGAL STATUS OF THE ARABS IN ISRAEL* (1990) and DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* (2002); see also Aharon Barak, Foreword: A judge on Judging: The Role of a Supreme Court in a Democracy, 116 HARV. L. REV. 19 (2002).

elements are in a constant state of flux against free elections and an independent judiciary which marks a significant repository of basic individual freedoms and rights for the Jewish part of the population.

If formal democracy as understood in Western legal literature can be defined as the combination, over a period of time, of freedom of expression and association and the recurrence of representative elections for the whole population, it has also been upheld with some consistency in Lebanon between 1943 and the outbreak of the civil war in 1975.

The Lebanese Constitution was elaborated in 1926 whilst the country was under French mandate. Much of the original text did not survive independence in 1943, but the overall presidential and parliamentary structures and the separation of powers were retained. Until the 1975 breakdown in civil and regional wars, the Lebanese institutional configuration was a combination of the 1926 Constitution and an oral, customary agreement between leaders of the Christian and Muslim Communities in the so-called "National Pact" of 1943.

The essential features of this combination can be summed up in the way Article 95 of the original Lebanese Constitution has been interpreted from 1943 until its amendment in 1990. Article 95 stated: "As a temporary measure, and for the sake of justice and concord, the communities shall be equitably represented in public employment and in the composition of the Cabinet, such measure, however, not causing prejudice to the general welfare of the State."⁷⁴ The various euphemisms in this "provisional" text have meant that the representation of the religious communities at all levels of public employment, from the President down to the lowest echelons, had to follow a specific communitarian power-sharing formula. At the top of the state structure, this formula is exemplified in the requirement that the three most important positions in the country, those of President, Prime Minister, and Speaker, be respectively allotted to the exclusive appointment of a Christian Maronite, a Muslim Sunni, and a Muslim Shi'i. Following a similar formula, the number of deputies in Parliament was calculated on the basis of a multiple of a 6 to 5 ratio of Christians to Muslims. Accordingly, out of 99 Members of Parliament, 54 were Christian and 45 were Muslim. Within the Christian group, 30 were Maronites, with the remaining 24 MPs divided across several smaller Christian communities. On the Muslim side, electoral law assigned 20 Sunni, 19 Shi'i, and 6 Druze posts.

The combination of regional turmoil, internal demographic changes, and political leaders' incompetence destroyed the delicate democratic experience in 1975. After a protracted civil war marked by regional and international interference, the constitutional balance was altered in 1989 in the Accords named after the Saudi city of Ta'if, where they were first agreed. In

⁷⁴ THE LEBANESE CONSTITUTION art. 95; AL-DASATIR, *supra* note 20, at 438-44.

September 1990, the Ta'if Accords were implemented in various amendments to the original Lebanese Constitution.

In essence, the religious-based "consociational" democracy prevailing until 1975 remains typical of Lebanese "democracy". In the post-Ta'if system, a slight decrease in Presidential powers in favour of a collective Cabinet role and an equal balance in a now 128-strong Parliament between Christian and Muslim deputies constitute the most important alterations, but the main hallmarks of pre-war Lebanon have been retained in a milder and more palatable form. A crucial test of the reestablishment of democracy appeared in the planned conduct of new elections under the Accords, but the occasion for the country to be back on firm democratic tracks was scuttled in the summer of 1992, which saw poor Christian participation and the rise of Syrian power, with thousands of troops remaining in the country despite an explicit clause in Ta'if requesting their withdrawal from Beirut and most Lebanese coastal cities. There was more participation in the elections of 1996, but the process was marred by irregularities, leading to the resignation of the president of the newly established Constitutional Council in April 1997.⁷⁵ The 2000 elections saw a surprise victory of a loose opposition, but it was only after the shockwave occasioned by the brutal assassination of the former Prime Minister on February 14, 2005, that the so-called Cedar Revolution succeeded, together with international pressure, to force the Syrian troops out.

Between the "Islamic" systems in Saudi Arabia and Iran, and the incomplete democratic experiments in Lebanon, Morocco, Jordan, Turkey, and Israel, range a number of authoritarian regimes which the Iraqi system typified until the fall of its three-decade long dictator in April 2003. The Constitution of Iraq is a good example of the way fundamental laws can be shaped to accommodate the authoritarianism of a regime. At the heart of the system is the Revolutionary Command Council (RCC), and the head of the RCC is effectively the highest power in the Republic. From 1979 until his downfall, Saddam Hussein held that position, as well as those of Army Commander-in-Chief, Prime Minister, and leader of the Ba'th party; adding in a 1994 reshuffle that of Prime Minister. Of all the Middle Eastern countries, Iraq probably held the most negative record in human rights violations and the centralisation of all authority under a single ruler. *Mutatis mutandis*, the same is true of Libya and Syria, and, to lesser degrees all the Arab countries that followed the Naser "constitutional RCC model." This model, established in Egypt informally by the 1952 "free officers" coup, was constitutionalised in a combination of military/unique party leadership (the Revo-

⁷⁵ See 3 THE YEARBOOK OF ISLAMIC AND MIDDLE EASTERN LAW 221, 221-227 (Eugene Cotran & Chibli Mallat eds., 1996) (referencing and describing the process of the 1997 crisis).

lutionary Command Council) across the self-labelled parliamentary regimes in the region, with variations from Mauritania to Pakistan, including Algeria, Tunisia, Sudan, the “PLO state”, and Eritrea. All these countries followed the core model established in Egypt and adopted by Iraq in increasingly authoritarian fashion since 1959, by Libya wholeheartedly in 1969, and by Syria determinedly since 1970.⁷⁶

The picture is not uniformly dark, however, and the region has witnessed a significant though inconclusive push towards democratic openings. Some elections have allowed for serious competition among candidates in an atmosphere of open debate, and the free and unadulterated exercise by the population at large of its right to vote. In the elections of Northern Iraq in May 1992, which were made possible by the so-called “safe haven” imposed on Baghdad in the wake of its defeat in the second Gulf War, seven parties were competing for a Kurdish assembly under a new electoral law.⁷⁷ In unified Yemen, the elections of April 1993 were held in an atmosphere which was remarkable for a country whose rate of illiteracy is staggering. More significantly, experiments of Turkey and Israel have reaffirmed, respectively, a rooted if intermittent practice, and an unblemished regularity. In the case of Israel, this regularity has been marred by the long-term occupation of the West Bank, the Golan and Gaza, and by too slow a disenfranchisement of the Arab citizens of Israel proper, who represent some eighteen to twenty percent of the population of the Jewish state.

Part of this openness has come from a general drive towards democracy in the world as a whole, compared to which the Middle East has trailed behind. On balance, constitutionalism as embodied in free and regular political consultations has taken the pattern of a seesaw, as in Egypt, Tunisia, and Jordan, with authoritarianism regaining the upperhand in more brutal manner. In some cases like Algeria, democratisation was boldly introduced in 1990-1991, only to produce a backlash which has brought violence in unprecedented fashion since the war of independence between 1956 and 1961. Other systems have failed to offer more than cosmetic reforms, and all share the dwarfing of constitutional attempts by the rulers’ adroit combi-

⁷⁶ See, e.g., ROGER OWEN, *STATE, POWER AND POLITICS IN THE MAKING OF THE MODERN MIDDLE EAST* (2d ed. 2000) (discussing the entire Middle East region); ALAN RICHARDS & JOHN WATERBURY, *A POLITICAL ECONOMY OF THE MIDDLE EAST: STATE, CLASS, AND ECONOMIC DEVELOPMENT* (1990) (discussing the economic aspect of rentier-bureaucratic states); GILLES KEPPEL, *MUSLIM EXTREMISM IN EGYPT: THE PROPHET AND PHARAOH* (Jon Rothschild trans., 2003) (discussing Egypt); HANNA BATATU, *SYRIA’S PEASANTRY, THE DESCENDANTS OF ITS LESSER RURAL NOTABLES, AND THEIR POLITICS* (1999) (discussing Iraq and Syria).

⁷⁷ Upon the invitation by the Kurdish leadership to the International Committee for a Free Iraq, which I animated in part, members of the ICFI helped organize monitoring of the elections. See Chibli Mallat, *Preface: The Renewal of Islamic Law* (1998).

nation of Western fear of extreme Islamic militant groups, who tend to snub democracy as a Western ploy which is incompatible with Islam, and the persistence of regional crises which offer easy excuses to the regimes in place not to move further towards democracy. But electoral democracy remains conspicuously high on the Middle Eastern agenda, and appears impressive in some instances, like the Kurdish elections in Northern Iraq in May 1992, the Yemeni elections of April 1993, and the January 2005 elections in Iraq. Peaceful street moments in Lebanon and elsewhere started in 2005, which combined with the yearning for free elections and change at the top to express democratic popular hope, but the experiment has not yet been decisive for the countries involved.

Democracy, of course, cannot be limited to a one-time electoral consultation, and in the fragile systems across the region, elections are meaningless if they are not recurrent. The civil wars which raged inside the Kurdish safe haven and in the Yemen in 1994 are powerful reminders of the difficult nature of the search for the rule of law across the Middle East in terms of political representation.

If war and the colonial West distorted the nascent liberal movements between the First and the Second World Wars, a period when Islamic ideology was generally on board the process of liberation/self-representation, there were also strong voices within the Islamic movement against democracy as a Western, and hence "bad" product. But even then, attention to detail is needed. When the dissenting Islamic voices came forcefully to the fore in the shape of the Khumainist revolution in 1978-1979 Iran, they had been adumbrated in Khumaini's lectures in Najaf in 1970 in a political, not in a constitutional garb. There, Khumaini's hatred for the West was rooted in the bitterness of many Iranians towards United States policy, which supported the Shah's despotism in return for cheap oil and extraterritorial jurisdiction for its citizens. In a pamphlet essentially directed at the frustration before what he perceived as the hypocritical onslaught of U.S. power, Khumaini's "Islamic" argument was never against parliaments, or elections. The Iranian Majlis flourished after the Revolution, even if any public debate remained heavily constrained by the principle of the *marja*'s constitutional dominance and the vetting power massively used by the Council of Guardians in both parliamentary and presidential elections.⁷⁸

⁷⁸ See, e.g., CHIBLI MALLAT, *SHI'IT THOUGHT FROM THE SOUTH OF LEBANON passim* (1988); MALLAT, *RENEWAL*, *supra* note 29, at 69; MALLAT, *21ST CENTURY*, *supra* note 12, at 129-31 (discussing Khumaini's Najaf lectures of 1970, considered the central ideological source of 'Islamic government' in Iran). See also IMAM KHOMEINI, *ISLAM AND REVOLUTION* 27-151 (Hamid Algar trans., 1981) (translations and annotations of Khumaini's lectures *Al-hukuma al-islamiyya* (Islamic government) and *wilayat al-faqih* in Arabic (*velayat-e faqih* in Persian), the rule of the jurist).

This should leave us with the acknowledgement that the zero-sum debate on incompatibility or compatibility between Islam and democracy—often interchangeable with “the West”—will remain active and unanswered for some time, until at least some of the political dust settles and a stable political and economic course is reached in one or more Middle Eastern countries. Meanwhile, the real questions on both sides of the Islam-West divide need to be defined with more precision.

The argument must first steer clear of any quintessential compatibility, because more sophisticated indices of the political-constitutional process are required to assess Middle Eastern constitutionalism in its relation to Islam. These indicators could be grouped into three core areas: electoral processes and alternation in power, civil society, and the courts. Since politics develop primarily on a national basis, each Middle Eastern country must be examined through those three prisms.

The first indicator concerns the existence and effectiveness of Parliament, and the recurrence of free elections to determine alternation in the leadership: thanks to parliamentary life, Turkey and Yemen have shown themselves in the past quarter of a century to be more democratic than Ba‘thist Iraq, and Iran is a far more lively place of public debate than Saudi Arabia or the United Arab Emirates.

Whether elections allow for a stable democracy hinges on the fact of their recurrence. The case of Algeria is the most dramatic in recent years, as the point was not so much to have elections, but how to create the conditions for them to recur as a matter of course. Any assessment of the “best conditions” for recurrence of elections involves an array of international and domestic legal considerations which have developed around the elusive concept of “a new international order” in the wake of the Gulf War. Since the Middle East is a natural candidate for realignments of potentially significant reach, the analysis requires attention, on both the domestic and regional levels, to the complex picture which is slowly emerging in Iraq, in Palestine, the neighbouring Levant countries, and in North Africa. This question will no doubt see significant developments for mechanisms which are needed to ensure that a group coming to power is constrained enough not to think that democracy equals free elections, but free recurrent elections.

A related central element for stability emerging from the electoral processes revolves around what should be the natural result of the voting exercise: the right to choose one’s ruler, which entails the right to end the ruler’s mandate. Trite as this consideration may be, it is particularly dramatic in the Middle East where the countries whose supreme ruler changes in the electoral process are the exception rather than the rule. In the past decades, this was the case for only a handful of systems, which included Israel, for its Jewish population; Lebanon, with one short and one long civil war, in addition to being interrupted with the prorogation of the mandate of

an incumbent president in October 1995, and interrupted again in September 2004; Turkey and Pakistan, with several military coups interludes. In all other countries, the supreme ruler dies in office, is killed, or flees into exile. A peaceful, orderly change at the top following a model defined by the rule of law is an exception which is for the moment limited to Israel, and to a lesser extent to Pakistan and Turkey. Across the rest of the region, there is not one example of orderly alternation at the helm.

Second, there is civil society at large: the parties, the press, the trade unions, the associations. Again, the quality of democratic life depends on the variety and strength of these organisations.

Saudi Arabia offers an example on one extreme side of the spectrum of "civil society" organizations. In the tribal Kingdom, where secrecy is of the essence, television dishes appeared in the mid-1990s as a formidable opening to uncensored information. In addition to a systematic purchase of controlling shares in any Arabic-speaking cable or satellite station, and the ownership of major international Arab newspapers published in London, the Saudi government followed in March 1994 the Iranian example by forbidding dishes and satellite television.⁷⁹ All communication runs, under a law which is technically inapplicable, under a centralised cable system.

This is a faint example of government and civil society being at odds, and it is difficult to see how sustainable such intellectual impoverishment can be. A state cannot give its people good education and expect them not to be ambitious or want to learn more, and government control is always a fax or an electronic mail message behind. In Iran itself, the story of the dissemination of Ayatollah Khomeini's speeches and sermons in 1977 and 1978 on audio cassettes is well known, and London-based Saudi and Bahraini oppositional groups have made systematic use of the internet, after a heavy use of faxes, to introduce their messages at home.

One could venture that civil society will eventually take care of the problem of censorship and constraints on various freedoms, as the people tend to be, on the long term, more inventive than the governments that straitjacket them as a matter of principle, more often than not in the name of religion. But governments can also be remarkably dogged in preventing the growth of civil society, and will pursue muzzling the press, imposing censorship, jailing dissidents, and preventing political and trade union groups from making an impact on the public scene. As a matter of course, human rights reports tend to be a long catalogue of governmental abuses against constantly re-emerging voices of dissent. The widespread turmoil affecting at the turn of the twenty-first century the domestic scene in all countries—

⁷⁹ See generally JON B. ALTERMAN, *NEW MEDIA, NEW POLITICS?: FROM SATELLITE TELEVISION TO THE INTERNET IN THE ARAB WORLD* (1998).

without exception—suggests that the battle between governments and civil societies is joined.⁸⁰

A related and final question is about the existence and power of courts: Is there an independent judiciary? Does this judiciary have a constitutional writ? How effective is it? The effective protection of human rights depends on the answer to this question. As for the courts, to which too little attention has been so far paid, the historical tradition of a respected judiciary in classical Islam should have triggered some concern for reviving and strengthening the judiciary. In Iraq under Hussein or Libya under Qadhdhafi, the writ of the courts does not go beyond the judge's desk. In Saudi Arabia, sections of the judiciary have triggered some respect when they were allowed public coverage, but the banning of law-reporting for the highest court is expressive of the absoluteness sought by the monarch. In Egypt, the system depends on the respect that the Executive is ready to entrust a judiciary which survived both Naser and Sadat. The effectiveness of courts is at the heart of the rule of law, and the Middle East is no exception to a universal need. Case-law and courts deserve a fuller, separate treatment.⁸¹

IV. A DEEPER CONSTITUTIONAL STRUCTURE? PERSONAL V. TERRITORIAL LAW

Whatever the transnational appeal on Arab, Muslim, or other ethnically or religiously defined constituent groups, we have seen that all countries in the modern Muslim world have adopted constitutions or basic laws, including the Kingdom of Saudi Arabia in 1992. For comparative public law, more telling than the discussion of the explicit "reference to Islam in the constitutional text" is the Westphalian model of nation-states as a contrastive "territorial model" to what we can describe as the "personal model." Under the personal model, law adheres to the person as a member of a given religious sect rather than to her belonging, as a citizen, to a nationally defined territory.

The system of nation-states is well-entrenched in all Muslim countries with sizeable Muslim populations; this is a fact of the twentieth century. Another fact is that the nation-state straitjacket does not operate well. In his *Summa* on Mediterranean society as seen from the Cairo Geniza documents of the 10th-13th centuries, Samuel Goitein provides archival evidence to the historical depth of a dysfunctional structure: "At the root of all this was the concept that law was personal and not territorial. An individual was judged according to the law of his religious community, or even

⁸⁰ See <http://www.mallat.com> (including a discussion of rapid developments spearheaded by the U.S. government as a new policy of democratization in the Middle East).

⁸¹ MALLAT, INTRODUCTION, *supra* note 7.

religious "school" or sect, rather than that of the territory in which he happened to be."⁸²

Compare this to René Maunier's passage from his 1935 report quoted at the beginning of this chapter, on the "effects of the transformation of law." After noting "the gains of written law over customary law, with the emergence of *Codes* in Muslim land," Maunier describes the second most important characteristic to be "the gains made by *territorial* law over personal law."⁸³

Confronted with the failure of democratic constitutionalism both in terms of working transnational institutions and domestic arrangements, one should therefore wonder whether the difficulty does not lie in deeper historical structures outlined, in the same society a thousand years apart, by our two scholars.

While fashionable after Samuel Huntington's *Clash of Civilizations*,⁸⁴ in which the fault line between Islamic and Western civilizations emerges as the defining paradigm of the international scene, any grand approach requires an initial *caveat*: the comparison between the West and Islam is uneven by nature, especially for lawyers. A depiction of a clash between two world patterns may have its merits, but the image breaks down in the many nuances and precisions needed for a comprehensive and accurate picture. "Civilization" is a fleeting concept. Islam is a religion, and several countries with a Muslim majority seem to have little in common despite sharing the same religion. Tunisia, Nigeria, and Indonesia hardly appear as a common legal bloc. Similarly, "Western civilization" is rarely defined in terms of religion, however much the concept of a "Judeo-Christian culture" is stretched since Nietzsche's devastating critique in *Beyond Good and Evil*⁸⁵ and *Genealogy of Morals*.⁸⁶ On the world scene, the dominant legal subject remains the nation-state.

So the modern nation-state is eminently territorial, including in the Middle East: within one's boundaries vests a legal system which is by definition exclusive of any other. All citizens in the state are bound by that system, and they become bound by the next door system as soon as they cross the international boundary.

⁸² S.D. GOITEIN, A MEDITERRANEAN SOCIETY: THE JEWISH COMMUNITIES OF THE ARAB WORLD AS PORTRAYED IN THE DOCUMENTS OF THE CAIRO GENIZA, VOL. 1: ECONOMIC FOUNDATIONS 66 (1967).

⁸³ René Maunier, *Plan d'enquête sur le Progrès du Droit en Pays Musulman*, in L'ENSEIGNEMENT DU DROIT MUSULMAN 168 (M. Flory & Jean-Robert Henry eds., 1989).

⁸⁴ SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1996).

⁸⁵ FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL (1886).

⁸⁶ FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS (1887).

Here is perhaps the historical fault line identified already in Goitein's works on 10th to 13th century Egypt. In the received world of Islamic law, this is illustrated in the divide made by classical lawyers between *dar al-harb* and *dar al-silm* or *dar al-islam*, the war territory as opposed to the peace-Islam territory.⁸⁷ The distinction forces a relation onto the law which tends to be far more strongly personal than it is territorial. The citizen carries under the divide her or his *religious* attachment to the law wherever he or she goes: while this is not completely unknown to an American or a French national, who may be bound for instance by fiscal laws of her country irrespective of territory, personal law is not the dominant relation outside one's country in a Westphalian system. It is in an Islamic one.

This sort of generalisation may be facile, with examples or counter-examples strengthening or weakening assumptions that the theory may render unnecessarily rigid. Still, one component is decisive, which grounds the issue of personality versus territoriality of laws in a special mould of a typical Middle Eastern constitutional system and arguably beyond, in Pakistan, India, Malaysia, and now Europe because of emerging, self-defining Muslim communities. This mould is at the root of the difficulty present nation-states in the Middle East confront for the future of their people.

The pre-Westphalian dimension of the debate can be brought into a more philosophical perspective. John Rawls addressed precisely the issue of democracy and religion in one of his latest works by giving the example "of Catholics and Protestants in the sixteenth and seventeenth centuries when the principle of toleration was honored only as a *modus vivendi*. This meant that should either party fully gain its way it would impose its own religious doctrine as the sole admissible faith."⁸⁸ In this case, which Rawls finds in "a constitution resembling that of the United States . . . honored as a pact to maintain civil peace," one does "not have stability for the right reasons, that is, as secured by a firm allegiance to a democratic society's political (moral) ideals and values."⁸⁹ Tolerance therefore is not a sufficient ground rule for conviviality of citizens.

Modus vivendi thus fails as the ultimate constitutional argument. Equally insufficient to the democratic ideal is the individual's identification with a group as a be-all and end-all component of society. Democracy is not ensured either in the second example adduced by Rawls: "Nor again do we

⁸⁷ See Chibli Mallat, *The Need for a Paradigm Shift in American Thinking: Middle Eastern Responses to "What We are Fighting For?"*, in THE CASE OF ARIEL SHARON AND THE FATE OF UNIVERSAL JURISDICTION 150 (John Borneman ed., 2004). See also KHALED ABOU EL FADL, REBELLION AND VIOLENCE IN ISLAMIC LAW (2001) and NOAH FELDMAN, AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY (2003).

⁸⁸ JOHN RAWLS, THE LAW OF PEOPLES 149 (1999) (footnote omitted).

⁸⁹ *Id.* at 149-150 (footnotes omitted).

have stability for the right reasons in the second example—a democratic society where citizens accept as political (moral) principles the substantive constitutional clauses that ensure religious, political, and civil liberties, when their allegiance to these constitutional principles is so limited that none is willing to see his or her religious or nonreligious doctrine losing ground in influence and numbers, and such citizens are prepared to resist or to disobey laws that they think undermine their positions.”⁹⁰

Rarely has the “demographic threat” in Israeli, Iraqi, or Lebanese societies been more clearly depicted in philosophical terms. The demographic argument, which attaches to communities fearing the loss of their numerical majority, is deafening in the Middle East. “Here again, democracy is accepted conditionally and not for the right reasons,”⁹¹ which is the equality of individuals coming together as transcendental citizens, that is as citizens moved by a moral law which is superior to their communitarian belonging, and even to the morality that may derive from their religion. Rawls states: “What these examples have in common is that society is divided into separate groups, each of which has its own fundamental interest distinct from and opposed to the interests of the other groups and for which it is prepared to resist or to violate legitimate democratic law. In the first example, it is the interest of a religion in establishing its hegemony, while in the second, it is the doctrine’s fundamental interest in maintaining a certain degree of success and influence for its own view, either religious or nonreligious. While a constitutional regime can fully ensure rights and liberties for all permissible doctrines, and therefore protect our freedom and security, a democracy necessarily requires that, as one equal citizen among others, each of us accept the obligations of legitimate law.”⁹² The conclusion is a damning verdict for any Middle Eastern-style democracy: “While no one is expected to put his or her religious or nonreligious doctrine in danger, we must each give up forever the hope of changing the constitution so as to establish our religion’s hegemony, or of qualifying our obligations so as to ensure its influence and success. To retain such hopes and aims would be inconsistent with the idea of equal basic liberties for all free and equal citizens.”⁹³

Powerful as the conclusion may be, we think it may not be a decisive indictment if the religious belonging of the individual, which forms in much of the Middle East a defining bond to his and her community, is perceived in a different mould. This mould is typically constitutional, and suggests that in the same way majoritarianism gets trumped in democracies by

⁹⁰ *Id.* at 150.

⁹¹ *Id.*

⁹² *Id.* (footnote omitted).

⁹³ *Id.*

the federal principle, as well as by the role of courts and government in acknowledging and defending “discrete and insular minorities,” some constitutional arrangement can, even must be sought, to accommodate that pervasive communitarian trait of Middle Eastern societies.

The issue described as personal versus territorial may be prospectively put in terms of communitarian versus territorial federalism. Three pressing constitutional examples at the beginning of the twenty-first century illustrate the difficulties that result.

Lebanon is a useful start, whose population is divided more or less evenly between its Christian and Muslim components. We have described the Lebanese constitution in the previous section. Let us now examine more closely its structural characteristic, derogatorily known as sectarianism or communitarianism, *confessionalisme* in French, *ta’ifiyya* in Arabic.⁹⁴ Lebanese constitutionalism recognises that the relationship between the citizen and the state is not an immediate, direct one. The relationship—or allegiance—is filtered by his or her community, in the case of Lebanon one of the eighteen or so sects that make up the country, resulting in a complicated realm of combinations simplified by an overarching line separating, in law, Muslims and Christians, and by the sometimes no less powerful separation between Muslim Sunnis, Muslim Shi’is, and Christian Maronites, the three larger communities in the country. While shocking to the equality of citizens as individuals, this complex sociological-constitutional situation is better approached positively, and somewhat approximately, as “communitarian” (or personal) federalism. Communitarian privilege derives from the personal scheme looking up to the *shari’a* as a millennium-guiding model, such pattern no doubt an old Middle Eastern characteristic harking back to whenever religion became the nexus of the individual’s relation to the community: a person is Muslim, or Christian, or Jewish, before she is Lebanese, French, or Saudi. In his great work on 10th to 13th century Egypt, Goitein describes that model as “medieval religious democracy.”⁹⁵

However frustrating to the Western constitutionalist, one should approach that feature *positively*: like Egypt or Morocco in the classical age, the Lebanese system is not an all-bad system, and people who sneer at it may see in the worldwide debate over the post-Ba’th Iraqi Constitution why

⁹⁴ It tends to appear in political science literature under the denomination “consociationalism,” a word coined by Arendt Lijphart in the late 1970s. See Arendt Lijphart, *Consociational Democracy*, in *DEMOCRACY, DIFFERENCE AND SOCIAL JUSTICE* 128-137 (Gurpreet Mahajan ed., 1998). In the Lebanese context, most prominent are the works of THEODOR HANF, *CO-EXISTENCE IN WARTIME LEBANON - DEATH OF A STATE AND BIRTH OF A NATION* (1993); ANTOINE MESSARRA, *THÉORIE GÉNÉRALE DU SYSTÈME POLITIQUE LIBANAIS* (2004); ELISABETH PICARD, *LEBANON, A SHATTERED COUNTRY* (1996).

⁹⁵ S.D. GOITEIN, *A MEDITERRANEAN SOCIETY: THE JEWISH COMMUNITIES OF THE ARAB WORLD AS PORTRAYED IN THE DOCUMENTS OF THE CAIRO GENIZA*, VOL. 2: *THE COMMUNITY* 5 (1971).

they should reconsider. It is a correct assumption, widely held and full of merit, that matters of governance in Iraq cannot be stable or fair, if the Sunni community is not represented in the decision-making process. This, actually, is the Lebanese constitutional litmus test: however 'low' a community may rank, it will retain, under the Lebanese Constitution, representation in government. Nor is this trait exclusively Lebanese. Its Middle Eastern roots are deep, and so recognised elegantly by Karl Marx, for whom the puzzling nature of Near or Middle Eastern history is that "it always takes the *appearance* of religion."⁹⁶

The persistent Lebanese constitutional model offers a wide archetype which replicates the personal as opposed to the territorial model in the rest of the region. It may not be out of place to conjure up Palestine-Israel as a *negative* counterexample, namely that a discrete and insular, historically victimised minority of Israeli Arabs, representing a fifth of the population, has never had serious executive representation in Israel's government. Under a Lebanese-like model, non-Jewish Israelis would be entitled to a fifth or a quarter of cabinet posts. The legal protection and representation of the indigenous Palestinian (defined as Christian or Muslim by the Jewish majority) community, which stands at the root of a conflict over a century old, is not different from the primary constitutional definition of Lebanese citizens as Christian or Muslim, of Iraqis as Shi'is or Sunnis, except that the definition in Israel is about who is a Jew and who isn't. In the legal and sociological study of Israel, Jewishness is granted to be the exclusive characteristic of the country, in the same way as 'Muslim-ness' would be emphasised in Iran or Pakistan. Because of the historic legacy of the Holocaust, this is an issue which is overwhelmingly seen as the be-all and the end-all of Israel as a state.

Over a period of fifty years, with remnants of the debate still current for the latest waves of immigration, Ethiopian and Russian, the central question for law in Israel was about "who is Jewish?" For Christians and Muslims directly affected by the emergence of Israel, they are by definition outside the legal order of a state defined by its Jewishness. This structural discrimination is seen in the three strands of victimisation of non-Jews since 1948: for those who were evicted from their homes and never allowed to return, they simply do not exist in the eyes of Israeli law. These are the refugees of 1948, defined by Israeli law as perpetual and irrevocable "absentees." For those who came in 1967 under occupation, a four-decade long domination coupled with slow and relentless expropriation of land hemmed them in an evernarrowing territory. For the one-tenth of the native population that was not evicted in 1948, and which grew to become about a million

⁹⁶ Letter from Karl Marx to Frederick Engels (June 2, 1855), in KARL MARX AND FRIEDRICH ENGELS, SUR LA RELIGION 123 (1980).

souls at the turn of the twenty-first century, the Israeli Arabs as they are called—the Palestinian Israelis as they could be more scientifically depicted—the Jewishness of the State of Israel has meant that their constitutional participation, at the bottom, was made available by an absolute right to vote, but that executive representation at the top remained tightly constrained by a combination of harsh legal rules and by overt discrimination against their participation in government or in the judiciary.

One understands now better Lebanon's deeper constitutional structures as defining a counter-constitutional model to the one dominant in the West since Montesquieu and the *Federalist Papers*. In the spring of 2001, drafts of the 1926 Lebanese Constitution were released, and they are sobering.⁹⁷ Two texts stand in open contradiction: Article 7 of the would-be constitution, and Article 95. In Article 7, like any other country, all citizens are declared equal. In Article 95, the communities must be respected as legal agents or intermediaries for those very citizens. As we saw in the previous section, this has not changed almost a century later, except that the current Article 95 has established parity between Christians and Muslims in Parliament, away from a multiple of the original formula (six Christians to five Muslim MPs) that prevailed until the so-called Ta'if Agreement in 1989.

It would be wrong to think the retrospective view stops at 1926. The earliest extant prototype of Lebanese constitutionalism, a text that goes back to 1836, established municipal councils, that is representation and executive power, in the major cities (then Sidon and less prominently Beirut), on the basis of parity between the number of Christian and Muslim councilmen.⁹⁸ By any historical measure, parity in representation between Muslims and Christians from 1836 to the 21st century is a deep structure, but that model is further entrenched in the so-called Ottoman *Millet* system, itself rooted in the medieval religious democracy so learnedly documented by Goitein, and possibly by legal calques of public law that go back much further in time. To simply jettison it under the name of individual equality, however the merit of the approach, may be unwarranted, if at all feasible.

On this complex and difficult legacy a new debate has taken place, with the concept of federalism in its midst. Federalism, in the constitutional concepts available to human thought, stands ahead of the traditionally centralised nation-state, and Middle Eastern national systems are increasingly

⁹⁷ CLAUDE DOUMET-SERHAL & MICHELE HELOU-NAHAS, MICHEL CHIHA 1891-1954 (2001). See also CHIBLI MALLAT, CONSTITUTIONALISM IN LEBANON: CONTINUITIES AND DISCREPANCIES (unpublished manuscript, on file with author). Both sources discuss Michel Chiha, a prominent figure of 20th century Lebanon, and author of the first drafts of the Constitution.

⁹⁸ Discussed in Chibli Mallat, *Du Fait Religieux Dans Les Institutions*, in CHIBLI MALLAT, L'UNION EUROPEENNE ET LE MOYEN ORIENT: ETAT DES LIEUX 83 (Chibli Mallat ed., 2004).

challenged by the example of such diverse countries as the United States, Germany, Nigeria or Malaysia where the federal model is common constitutional ground.⁹⁹

The problem is that federalism, in any system that constitutional lawyers recognise on the planet, is inevitably territorial. With federalism following territory, and history, one has Rhode Island's and California's representatives co-existing happily in the U.S. Senate as equals.

California takes the revenge of numbers over Rhode Island in other ways, but the territorial model remains the rule. When it comes to the executive branch, the majority of votes tend to bring the person chosen by the majority of people to the Presidency, with Californians and Rhode Islanders counting almost equally at the polls.

Here appear the many difficulties of constitutionalism beyond the sociological set-up in Lebanon, Iraq, Israel, the Middle East, and North Africa generally, where the principle of full equality between two citizens within the country is at stake. Federalism, to be meaningful, is forced to give way to corrective representation of communities standing in lieu of states, and this is a non-territorial scheme by-and-large.

Nor is the scheme easy to implement. Populations are interwoven, people move about, and while there may be majorities, often dominant, in a given territory, cities and the urban trend which has become a universal sociological trait by the end of the twentieth century blur that alleged racial, religious, or national cohesion. Rarely if ever is there territorial "purity," and the absence of real or imagined cohesion entrenches the problem: communitarian federalism requires territories which are homogenous. They are not readily available in most of the Muslim world, and when they are, may result from forms of ethnic cleansing which no one wishes to consecrate in law. Even when such territories appear to be homogenous, the problem gets translated on their borders, as one can see at the turn of the 21st century in Kirkuk between Arab and Kurdish Iraqis, in Baghdad between Sunnis and Shi'is, in Jerusalem between Jews and non-Jews (or Israelis and Palestinians), or in Beirut and its suburbs between Shi'i and non-Shi'i Lebanese.

The central problem for federalism, in Iraq, Lebanon or Israel, is also thornier than elsewhere in the world, since the issue tends not to be separation of powers in the three executive branches of government, but the fight in the centre over executive power. Executive power is a difficult puzzle by nature, as Robespierre saw it two hundred years ago: one cannot have executive power if one has only part of it. A democratic system believes in

⁹⁹ See CHIBLI MALLAT, *DEMOCRACY IN AMERICA* (2001) (discussing the U.S. and federalism as major contributors to world political theory and practice). See also Chibli Mallat, *Federalism in the Middle East and Europe*, 35 CASE W. RES. J. INT'L L. 1 (2003).

the exercise by the individual citizen of his or her free choice to cast a vote for an executive chief eventually chosen by the majority.

There is no readily available answer to that conundrum, and various forward arrangements are being examined and tested, as in the presidential triumvirate of Iraq that emerged in 2004.¹⁰⁰ Such schemes tend to become bewildering and unduly complex for the pervasive quotas they encourage, and multi-religious and multi-ethnic mosaics cloud one's moral principles on the basic equality amongst citizens. The problem remains: to put the issue in simple words, the individual's allegiance in the Middle East, including Israel and Lebanon, is dual in law. He or she operates nationally, as a constitutional citizen in a Habermas way. But he or she also relates to public affairs through his or her religious or sectarian affiliation, which makes the community a constitutional agent recognised in law. That fault line is hard to bridge, and new constitutional formulas may be needed that bring together not only the dilemma identified in this section, between the personal and the territorial, but also the two other constitutional conundrums discussed earlier: (a) how does a federal system acknowledge communities on the other side of the border—for instance for Kurdish Iraqis their folk in Syria, Iran or Turkey, and even communities who do not live in adjacent states, for instance Lebanese Shi'is vis-à-vis their sister communities in Iraq or Iran; and (b) how will the classic pillars of constitutional democracy, popular and competitive choice of leaders, separation of powers, and judicial or constitutional review operate in such a system?

For the Middle Eastern world, bringing citizenship and community allegiances together into one working framework is the challenge of constitutionalism for the twenty-first century. Meanwhile, the clash between the two legal logics of personality and territoriality remains daunting, and it is against the pulls and pushes that they force onto the world system that constitutional law must be assessed inside each Middle Eastern jurisdiction.

V. EPILOGUE

No doubt the search for transnational accommodation continues in the Middle East, but the nation-state remains the essential framework for constitutional law. With the possible exception of Yemen and the United Arab Emirates, formal transnational unions have failed. It may be that the new economic and informational networks on the level of the planet have started to undermine the dominance of the nation-state, but it will be some time before Middle Eastern legal and judicial institutions accommodate the

¹⁰⁰ Chibli Mallat, Third Annual Bernstein Memorial Lecture: Constitutions for the 21st Century: Emerging Patterns (Sept. 28, 2004), <http://www.law.duke.edu/webcast/> (follow hyperlink "Third Annual Bernstein Memorial Lecture with Professor Chibli Mallat").

international process hazily adumbrated as “globalisation.” Meanwhile, the example of neighbours keeps weighing heavily on the domestic developments in each country, for better and for worse. In 1992, the halt of constitutional democratisation in Algeria froze a similar process in the whole of Arab Africa, whilst successful elections and the assertion of judicial independence and effectiveness anywhere in the Middle East are envied by neighbouring populations and feared by the ruling potentates who are naturally concerned that the constitution would bring constraints on their own overbearing powers.

At the same time, the debate on the Islamic tradition accommodating democratic mechanisms persists, with two alternative poles: the collapse into chaos if the accommodation is blunted or prevented on the one end of the spectrum—as in Algeria or Afghanistan under the Taliban; on the other end, the slow emergence of movements having at heart the recurrence of free elections in their societies to choose their leader and, as importantly, to change him. The prevalence of one trend over the other is not easy to predict, but the battle is joined, with factors of density of civil society, domestic, regional and international power politics, and neighbourhood examples pulling on constitutional law in several directions at once.

Unanswered remains the question of personal, as against territorial law, which affects the Middle East in the arguably most significant challenge of constitutional law since Montesquieu. With the constitutional entrenchment of communities defined on the basis of religion, and even sect, the communitarian model openly espoused in the Lebanese constitutional system appears increasingly as a dominant model for countries in which minorities seek representation over and above basic majority rule. The conflict between personal and territorial models of constitutional conviviality is joined. If history is to be the guide, it will not be solved soon.

Within this larger challenge, the question about compatibility or incompatibility between a world civilization—Islam, and a political system—democracy, is better avoided. Emergence of Muslim-democrat movements across the Islamic world, like in Turkey in the 1990s, helps bring a soothing perspective on the red herring argument of Islam’s intrinsic incompatibility with democracy. Such movements need to be appraised in each country, in the same way as other nationalist or otherwise based political groupings, against the activities of governments when in opposition and, when in power, for their own activities with respect to recurrent and meaningful elections, the texture of civil society, and the protection of the individual’s basic rights.

Constitutional law plays itself out also in the judicial “mirror” of civil society, with courts being constantly curtailed by executive power, and judges, lawyers, and the society at large fighting to enhance an independent and meaningful judiciary as the main factor of civilised stability. In the absence of the realisation of the independence and integrity of the judicial

process as the neutral terrain for the resolution of social problems, the whole constitutional process is left to “civil society” in sheer opposition to the state. In that case, the state finds itself in a situation where legality precludes legitimacy. In that case indeed, where the protection of human rights is left to “civil society,” constitutions get emptied of any significance. Judges are part of the state as a matter of course, and it is as the third branch of government, including for their normally exclusive access to the Weberian “monopoly of violence,” that they should first and foremost be approached for the proper appreciation of constitutional law. They are its ultimate defenders. The slow emergence of judicial constitutional review is a novelty in the Middle East, and one needs to assess it in far more detail.¹⁰¹

¹⁰¹ MALLAT, INTRODUCTION, *supra* note 7.